89-794

No. _____

In The

Supreme Court of the United States

October Term, 1989

DENNIS MICHAEL MCCAMBRIDGE,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Writ Of Certiorari
To The Court of Criminal Appeals
Of The State Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution allows a suspect in custody for suspicion of driving while intoxicated, but prior to the initiation of criminal proceedings, to be provided the limited right to the assistance of counsel prior to submitting to a chemical test or motor skills exercises?

II.

Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution permits a trial judge to reject a defendant's claim that his eventual consent to provide a breath sample in a driving while intoxicated prosecution was involuntary where the State produces no evidence to rebut the defendant's evidence of coercion.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

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OPINION BELOW

McCambridge v. State, 698 S.W.2d 390 (Tex.App. – Houston [1st Dist.], 1985), *vacated and remanded*, 712 S.W.2d 499 (Tex.Crim.App. 1986), and *McCambridge v. State*, 725 S.W.2d 418 (Tex.App. – Houston [1st Dist.], 1987), *affirmed*, ___ S.W.2d ___, Tex.Crim.App. No. 297-87 (Delivered September 11, 1989), the decisions of the First court of Appeals of Texas and the Texas Court of Criminal Appeals at issue are reproduced in Appendices A, B, C, and D respectively.

JURISDICTION

The Texas Court of Criminal Appeals, Texas' court of last resort in criminal cases, had appellate jurisdiction over the judgments of the court of appeals and the county-criminal-court at law pursuant to Rule 200(a) of the Texas Rules of Appellate Procedure. Its decision was entered on September 13, 1989 and no motion for rehearing was filed. Consistent with this Honorable Court's Rule 20, this petition is timely filed if done so on or before November 13, 1989.

This Court's jurisdiction in the instant case is based upon 28 U.S.C. §1257 to review "final judgments or decrees rendered by the highest Court of a State in which a decision could be had . . . by writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of . . . the United States."

QUESTIONS PRESENTED (RESTATED)

I.

Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution allows a suspect in custody for suspicion of driving while intoxicated, but prior to the initiation of criminal proceedings, to be provided the limited right to the assistance of counsel prior to submitting to a chemical test or motor skills exercises?

II.

Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution permits a trial judge to reject a defendant's claim that his eventual consent to provide a breath sample in a driving while intoxicated prosecution was involuntary where the State produces no evidence to rebut the defendant's evidence of coercion.

CONSTITUTIONAL PROVISION AT ISSUE

The Fourteenth Amendment to the United States Constitution provides in pertinent part that "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

The facts pertinent to an understanding of the contentions herein advanced are taken from the record herein which was made at the motion to suppress evidence hearing. The following statement of facts, which was filed in appellant's original brief recites:

STATEMENT OF FACTS

A. Background of Appellant at Time of Arrest

On May 21, 1984, Dennis Michael McCambridge, Appellant, was thirty years old (R. at p. 7, L.15). He was employed as a district sales manager for the Daco Corporation, an industrial rubber products business (R. at p. 9, L.1-13). Prior to his arrest, the Appellant had

received a bachelor of arts degree from the University of Delaware (R. at p. 8, L.8-9). He had no academic courses in police science (R. at p. 8, L.10-11), criminology (p. 8, L.12-13), criminal law (p. 8, L.14-15), constitutional law (p. 8, L.16-17), or criminal procedure (p. 8, L.18-19). Further, Appellant had never attended any law school (p. 8, L.20-21), never received any legal training (p. 8, L.22-23), nor had he even been a law enforcement officer (p. 8, L.24-25).

B. Scene at Arrest Location – Actions by Appellant and the Arresting Officers

Appellant was arrested for diving while intoxicated approximately 11 p.m. on May 21, 1984 (p. 7, L.21; p. 11, L.1-2). At the time of his arrest he was driving alone and was on his way home (p. 11, L.7-8). Just prior to reaching his home, Appellant was pulled over at the road intersection of Bingle and Emnora, Harris County (p. 7, L.21), by two Houston Police Department uniformed officers in a marked police car (p. 11, L.15-26; p. 12, L.1-2). Appellant was not advised of his *Miranda* rights at the time or scene of his arrest (p. 21, L.13-15).

However, Appellant did ask the officers for a lawyer to aid him as they placed him into the squad car at the arrest location (p. 13, L.16-20). The officers responded to Appellant's request for counsel by telling him he could not have a lawyer until he got downtown (p. 13, L.21-23). Thereafter, Appellant was transported by his arresting officers to the Houston Police Department and then taken into a video interrogation room (p. 12, L.8-15).

C. *Interrogation Setting of the Houston Police Department Video Room*

Three uniformed police officers were present with Appellant in the video interrogation room (p. 10, L.4-6). A telephone was also in the video room. However, no privacy existed for Appellant to have a confidential telephone conversation because of the officers presence and because of the video and audio recordings which were then being made (p. 15, L.5-11).

D. *Actions of Appellant and the Interrogating Officers In the Video Interrogation Room*

Upon his arrival in the video interrogation room, the Appellant believed he was not free to leave (p. 13, L.7-9). It was at this time that the officers formerly advised Appellant of his *Miranda* rights (p. 12, L.16-20). After receiving his *Miranda* rights, the Appellant again told the officers he wanted to consult with counsel (p. 13, L.24-25; p. 14, L.1-3). The officers responded to Appellant's request for the presence (p. 14, L.23-24) of an attorney by instructing him to use the telephone (p. 14, L.2-5). The officers did not afford Appellant a private telephone conversation as they remained present with him. Further, the Appellant believed it was impossible to establish any private or confidential telephone conversation because of the police presence and the continuous videotape recording (p. 15, L.5-11).

Notwithstanding the lack of privacy, Appellant did make a telephone call to his wife when the video room's phone was first made available to him by the officers at 12:15 a.m. (p. 14, L.7). Appellant did telephonically speak with his wife and requested her to contact his civil lawyer, who resided in Dallas (p. 23, L.16), and also,

to contact a friend who was an assistant district attorney (p. 25, L.3-10). Appellant's purpose in having the Dallas lawyer (p. 14, L.10-16) and the prosecutor (p. 25, L.3-10) contacted was so his wife could be referred to a local criminal lawyer in Houston to help him. Appellant called his wife rather than his Dallas civil lawyer because he did not know the attorney's telephone number (p. 24, L.3-4). Moreover, the Appellant had learned that the officers were not going to permit him to make a long distance call (p. 24, L.5-7). Appellant did try to provide a callback telephone number to his wife in order that the attorney she contacted could call him, however, the officers informed him that no incoming calls would be permitted (p. 14, L.17-22). The Appellant then terminated his conversation with his wife to allow her to contact counsel for him.

Having understood that Appellant had invoked his right to the presence of counsel and seeing that the telephone conversation with his wife had ended, the officers initiated further interrogation of Appellant (p. 15, L.5-11). However, Appellant desired a lawyer present (p. 14, L.23-24) to properly advise him (p. 15, L.3-4) and again invoked his right to an attorney (p. 15, L.20-21).

The officers' response to Appellant's request for counsel was the same as before – use the telephone (p. 15, L.24-25). Appellant attempted to again call his wife but the line was busy and he hung up (p. 16, L.1-6). Thereafter, the officers, like before, continued their interrogation of Appellant (p. 16, L.5-7). Appellant again asked for the presence of a lawyer (p. 16, L.8-9), but the interrogation continued. In fact, Appellant requested counsel another seven (7) times while in the video interrogation room – in all, Appellant requested counsel ten times while on videotape (p. 16, L.11). With each successive

request for assistance of counsel the interrogating officers become more hostile towards him (p. 16, L.18-23). After Appellant requested counsel for the eleventh time (counting his first request at his arrest), the officers abruptly ended the videotape recording session and took him outside the room and into the hallway (p. 16, L.24-25; p. 17, L.1-7).

E. Actions of Appellant and the Interrogating Officers in the Hallway

While in the hallway, off tape, the officers again continued their interrogation of Appellant (p. 17, L.12-18). Again, Appellant requested counsel for the purpose of getting advice (p. 17, L.21-24) and again the officers continued to question him.

Present in the hallway were eight (8) to ten (10) police officers (p. 19, L.9-10). In the immediate area of the Appellant were the interrogating officer and three (3) other officers (p. 19, L.11-14). A different officer was now interrogating Appellant than those who questioned him in the videotape interrogation room (p. 18, L.12-13).

The single topic of discussion by the interrogating officer was whether or not Appellant would submit to a breath test (p. 18, L.14-19). The officer again and again attempted to persuade Appellant to take a breath test without the advice of counsel (p. 18, L.14-19). Here, in the hallway, the Appellant still believed he was not free to leave (p. 19, L.5-6). This hallway interrogation continued for approximately another five (5) to ten (10) minutes (p. 18, L.8-9).

The interrogating officer told the Appellant if he did not take a breath test that he would: automatically be found guilty, lose his license,

go to jail, and possibly lose his job (p. 18, L.20-25). In all, Appellant requested counsel approximately five (5) to seven (7) times while in the hallway (p. 18, L.3-7). Responding to his counsel requests, the police said to Appellant "that a lawyer was going to screw up anything that might be done here" (p. 19, L.1-4).

F. Thought Processes of Appellant

After his eighteenth unheeded request for counsel to be present, Appellant, feeling compelled to do what the officer wanted (p. 19, L.21-25) and believing he had no choice to refuse the test (p. 19, L.17-19), acquiesced to the taking of a breath test (p. 19, L.15-16).

At the hearing on his Motion to Suppress, Appellant related that the scenario created by the officers caused him to be confused as he did not understand how and when he could invoke any of his Miranda rights (p. 12, L.21-25; p. 13, L.1-3). This confusion and lack of a proper understanding of his rights was corroborated by the testimony of the Intoxilyzer operator Officer Klein (p. 26, L.25, p. 27, L.1-2, and, p.28, L.4-5).

G. No Rebuttal by the State

The State's police officer witnesses were present in court during Appellant's testimony at his Motion to Suppress on July 25, 1984. Although it was requested by defense counsel that they be placed under the Rule, the Court overruled the motion and the officers remained in the courtroom. Of import, is the fact that after the officers had heard Appellant's testimony the State offered no rebuttal testimony (p. 7, L.6-9).

On appeal to the First Court of Appeals in Houston, that court rejected, *inter alia*, the Petitioner's contentions

that he was entitled to the assistance of counsel on the strength of the Due Process Clause of the Fourteenth Amendment prior to deciding whether to provide a breath sample for an intoxilyzer test and that his consent to provide a breath sample was involuntarily obtained notwithstanding the State's failure to rebut this contention. *McCambridge v. State*, 698 S.W.2d 390 (Tex.App. – Houston [1st Dist.], 1985).

The Texas Court of Criminal Appeals refused the Petitioner's request to grant review of the court of appeals' holding as to voluntariness of his consent to provide a breath sample. *McCambridge v. State*, 712 S.W.2d 499, 501 at n. 6 (Tex.Crim.App. 1986).[1] The Court of Criminal Appeals, however, did grant review of the court of appeals' holding regarding the Petitioner's right to the assistance of counsel prior to deciding whether to provide a breath sample. *Id.* at 500. That court vacated the court of appeals judgment and remanded the cause to that court so that it consider, *inter alia*, whether the Petitioner's right to the assistance of counsel pursuant to the Due Process Clause of the Fourteenth Amendment was violated. *Id.* at 507.

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[1] Although the Court of Criminal Appeals declined to review this contention, as a matter of state appellate practice, it had the power to revise its decision in this regard at any time prior to its decision on September 13, 1989. Given the fact that its judgment in this regard was not final until that date, this question is properly before this Honorable Court for review in addition to the assistance of counsel question ultimately decided by the Court that same day.

On remand, the First Court of appeals rejected the Petitioner's contention that his right to the assistance of counsel was violated pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *McCambridge v. State*, 725 S.W.2d 418 (Tex.App. – Houston [1st Dist.], 1987).

The Texas Court of Criminal Appeals again granted review of the court of appeals' decision in this regard and on September 13, 1989, held that the Petitioner had no right to the assistance of counsel under the Fourteenth Amendment's Due process Clause prior to deciding whether to provide a breath sample for an intoxilyzer test. *McCambridge v. State*, ___ S.W.2d ___, Tex.App.No. 297-87 (Delivered September 13, 1989)(not yet published). The Court of Criminal Appeals held that this Honorable Court has restricted the due process guarantee of counsel to civil proceedings, quasi-civil proceedings, or appeals. Inasmuch as a driving while intoxicated prosecution is a criminal case, the Texas Court of Criminal Appeals held that there is no due process right to counsel as vouchsafed by the Fourteenth Amendment, only the right to counsel as guaranteed by the Sixth Amendment. ___ S.W.2d ___, Slip Op. at 7-8.

REASONS FOR GRANTING THE WRIT

In holding that that a citizen in custody for suspicion of driving while intoxicated does not have the limited right to counsel under the Due Process Clause of the Fourteenth Amendment prior to submitting to a chemical test or motor skills exercises, the Texas Court of Criminal

Appeals rendered a decision in direct conflict with the courts of last resort of at least four states. *See Kuntz v. State Highway Commissioner*, 405 N.W.2d 285 (N.D. 1987); *State v. Juarez*, 775 P.2d 1140 (Ariz. 1989); *Sites v. State*, 481 A.2d 192 (Md. 1984); *State v. Newton*, 636 P.2d 393 (Or. 1981). This fact implicates this Court's Rule 17 (.1)(b). and compels the granting of the instant petition.

The Texas Court of Criminal Appeals' denied review of the First Court of Appeals of Texas' holding that the trial judge's rejection of the Petitioner's claim that his eventual consent to provide a breath sample in this case was involuntarily given did not offend the Due Process Clause of the Fourteenth Amendment. Given the fact that the State produced no evidence to rebut this contention, this decision of the Texas courts itself presents a pair of reasons for the granting of this petition. First, this holding "decided an important question of federal law which has not been, but should be, settled by this Court. See U.S. Supreme Court Rule 17 (.1)(c). Second, the holding of the court below is at odds with this Court's holdings concerning the burden of proof in consent cases in cases such as *Schnekloth v. Bustamonte*, 412 U.S. 218 (1973), *Bumper v. North Carolina*, 391 U.S. 543 (1968), and *Jackson v. Denno*, 378 U.S. 368 (1964), and implicates this Court's Rule 17 (.1)(c), as well.

Any of this trio of reasons provides a compelling basis for this Court to grant this Petition for Writ of Certiorari.

ARGUMENT

I.

THE TEXAS COURT OF CRIMINAL APPEALS ERRONEOUSLY HELD THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT ALLOW A SUSPECT IN CUSTODY FOR SUSPICION OF DRIVING WHILE INTOXICATED, BUT PRIOR TO THE INITIATION OF CRIMINAL PROCEEDINGS, TO BE PROVIDED THE LIMITED RIGHT TO THE ASSISTANCE OF COUNSEL PRIOR TO SUBMITTING TO A CHEMICAL TEST OR MOTOR SKILLS EXERCISES.

The Due Process Clause of the Fourteenth Amendment has long been recognized as a source of a right to counsel independent of the Sixth Amendment where it is critically important to the fairness of the proceedings. *See e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970); *Simmons v. United States*, 390 U.S. 377 (1968); *In re Gault*, 387 U.S. 1 (1967). The concept of such a due process right was recognized as long ago as this Court's decision in *Palko v. Connecticut*, 302 U.S. 319 (1937), as a guarantee of respect for those personal immunities which are so rooted in the traditions and conscience of our people as to be ranked as fundamental or implicit in the concept of ordered liberty. This right, as reflected in this Court's holding in *Rochin v. California*, 342 U.S. 165, 173 (1952), is one that assures that

convictions cannot be brought about in criminal cases by methods which offend a sense of justice.

In *South Dakota v. Neville*, 459 U.S. 553, 564 (1983), this Court recognized that "[t]he choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make." Implicit in this sentiment is the notion that the decision whether to submit to the State's chemical-alcohol test is one of the most fundamental importance in determining the ultimate resolution of the suspect's case. *See Brosan v. Cochran*, 516 A.2d 970, 976 (Md. 1986).

A number of state courts of last resort have subscribed to this notion in holding that the Due Process Clause gives a citizen in custody for suspicion of driving while intoxicated the limited right to the assistance of counsel prior to deciding whether to submit to a chemical test to determine the suspect's level of intoxication. In *People v. Gursey*, 239 N.E.2d 351, 352 (NY. 1968), the Court of Appeals of New York recognized that "[L]aw enforcement officials may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand."

The *Gursey* holding has been followed by the courts of last resort in Arizona, Oregon, and Maryland, to name just a few. In *State v. Newton*, 636 P.2d 393, 406 (Or. 1981), the Oregon Supreme Court noted that:

> "[A]llowance of a telephone call following arrest has become traditional and incommunicado incarceration is regarded as inconsistent with American notions of ordered liberty. Freedom of

> an arrested person to communicate is a significant liberty which may only be officially restricted if there is legal authority to do so."

In holding that the Due Process Clause afforded a driving while intoxicated suspect the right to the assistance of counsel prior to submitting to a chemical test, the Oregon Supreme Court held that such a right would attach so long as the assertion of such a right would not be disruptive of the State's ongoing investigation or evidence-gathering procedure. *Id.* at 406.

In *Kunzler v. Pima County Superior Court*, 744 P.2d 669, 670-671 (Ariz. 1987), the Arizona Supreme Court concurred with the sentiments expressed by the courts of last resort in Oregon and New York. The Arizona Supreme Court held that only when the exercise of the right to counsel will hinder an ongoing investigation must it give way in time and place to the investigation of the police. Because there was no evidence of such a hinderance, the Due Process Clause compelled that the accused be afforded the assistance of counsel prior to deciding whether to submit to a chemical test. *Id.*

The Maryland Court of Appeals likewise subscribed to the belief that the Due Process Clause affords a driving while intoxicated suspect the limited right to counsel in its determination of *Sites v. State*, 481 A.2d 192, 200 (Md. 1984), in holding that:

> "[W]e think to unreasonably deny a requested right of access to counsel to a drunk driving suspect offends a sense of justice which impairs the fundamental fairness of the proceeding. We hold, therefore, that the due process clause of the Fourteenth Amendment . . . requires that a person under detention for drunk driving must,

> on request, be permitted a reasonable opportunity to communicate with counsel before submitting to a chemical sobriety test, as long as such attempted communication will not substantially interfere with the timely and efficacious administration of the testing process."

It is critical to note that in affording the accused the limited right to the assistance of counsel, that counsel will be able to assist the accused in preserving potentially exculpatory evidence. Specifically, if a decision to submit to a chemical test is made,[2] counsel would advise the accused that because a breath sample is not capable in most instances of being preserved for later re-testing and because due process does not require the preservation of such a breath sample, *California v. Trombetta*, 467 U.S. 479 (1984), that he or she ought to instead submit to a blood test[3] which is capable of being preserved for re-testing.[4] Indeed, this very Court implied that due process could be offended if police refused a driving while intoxicated suspect's request to undergo a reasonable alternative

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[2] Texas allows a driving while intoxicated suspect to refuse chemical testing. Article 6701*l*-1, §2(b), TEX.REV.CIV.STAT.ANN. (Vernon 1984); *McKenna v. State*, 671 S.W.2d 138 (Tex.App. – Houston [1st Dist.], 1984).

[3] Texas provides for chemical testing of breath, blood, or urine. Article 6701*l*-1, §(a)(1), TEX.REV.CIV.STAT.ANN. (Vernon 1984).

[4] In Texas, a driving while intoxicated suspect has a right to an independent blood test if he or she can make arrangements to have a test speciman drawn within two hours of his or her arrest. Article 6701*l*-5, §3(d), TEX.REV.CIV.STAT.ANN. (Vernon 1984). Petitioner believes that a blood test under §3(d) or §(a)(1), *supra*, at n. 2, is a reasonable alternative test. *See also*, Article 6701*l*-5, §1, which states that the Texas implied consent statute provides for the taking of either breath *or blood*.

chemical test. *South Dakota v. Neville, supra,* at 559, n.9. Additionally, counsel would similarly encourage an accused who would otherwise not perform the videotaped[5] skills exercises requested of those accused of driving while intoxicated in Texas, to perform such exercises so that this quantum of potentially exculpatory evidence could be preserved.

In disposing of this contention, the Texas Court of Criminal Appeals summarily noted that since this Court's decision in *Gideon v. Wainwright,* 372 U.S. 335 (1963), "[T]he due process guarantee of counsel has been restricted to civil proceedings, quasi-civil proceedings, or appeals." *McCambridge v. State, supra,* slip op. at 8 (Citations omitted). Such result-oriented reasoning is not only at odds with the reasoning employed by those courts of last resorted whose contrary holdings are recounted, *supra,* it purports to create its own definition of what procedural safeguards are required to ensure the fundamental fairness of a proceeding which by definition portends the "grievous loss" of liberty on the part of a citizen so situated. *Morrisey v. Brewer,* 408 U.S. 471, 481 (1972).

The Texas Court of Criminal Appeals' evisceration of the Due Process Clause of the Fourteenth Amendment within the confines of this case compels the granting of this Petition for Certiorari.

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[5] Texas requires all driving while intoxicated suspects in counties with populations in excess of 25,000 to be videotaped. Article 6701*l*-1, §24(a), TEX.REV.CIV.STAT.ANN. (Vernon 1984).

II.

THE FIRST COURT OF APPEALS OF TEXAS ERRONEOUSLY HELD THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PERMITTED THE TRIAL JUDGE TO REJECT THE PETITIONER'S CLAIM THAT HIS EVENTUAL CONSENT TO PROVIDE A BREATH SAMPLE IN HIS DRIVING WHILE INTOXICATED PROSECUTION WAS INVOLUNTARY WHERE THE STATE PRODUCED NO EVIDENCE TO REBUT THE PETITIONER'S EVIDENCE OF COERCION.

When the State seeks to rely upon a defendant's consent to justify the lawfulness of its agents' actions, it has the burden of proving that the consent was, in fact, freely and voluntarily given, and not the result of duress or coercion, express or implied. *Schnekloth v. Bustamonte*, 412 U.S. 218, 248 (1973); *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). Moreover, the State may not satisfy its burden in this regard by showing a mere submission to a claim of lawful authority. *Florida v. Royer*, 460 U.S. 491, 497 (1983); *Bumper v. North Carolina, supra*, at 549-550.

In *Schnekloth v. Bustamonte, supra*, at 225-226, this Court noted that:

> "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."

See also Culombe v. Connecticut, 367 U.S. 568, 602 (1963); *United States v. Watson*, 423 U.S. 411, 424 (1976).

The question of whether a suspect's consent is, in fact, voluntary, or is the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances, *Schnekloth v. Bustamonte, supra* at 227. The "totality of the circumstances" test was all but ignored by the First Court of Appeals of Texas in summarily rejecting the Petitioner's contention that his eventual consent was involuntarily given. As that court noted:

> "The question of whether appellant's consent was knowing and voluntary was one for the trier of fact, who could have reasonably concluded that the appellant voluntarily consented to take the breath test. The trial court did not err in denying the appellant's motion to suppress."

McCambridge v. State, 698 S.W.2d at 395. (Citation omitted).

The First Court of Appeals failed to engage in an analysis of any of those factors alluded to by this Court in *Schnekloth v. Bustamonte, supra*, at 227, which include the youth of the accused, their lack of education or low intelligence, the lack of any advice to the accused as to their constitutional rights, the length of detention, and the repeated and prolonged nature of the questioning. Rather, the lower court noted in passing that there was no evidence of any "violence or trickery on the part of the peace officers," in obtaining the Petitioner's eventual consent.[6] *McCambridge v. State*, 698 S.W.2d at 395. Left

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[6] In actuality, the record does show that appellant was indeed tricked into submitting to the breath test on the officers' claim he would be automatically found guilty of DWI for refusing. Texas has no such law.

unsaid in the court's cavalier treatment of this contention is that the State produced absolutely no evidence to rebut the Petitioner's evidence and his contention that his will to resist had been overborne. Moreover, the lower court failed to find coercion on the part of the police even though the State had the police officers present in court and available to testify at the hearing but opted to offer no rebuttal evidence whatsoever.

In this Court's seminal decision in *Culombe v. Connecticut, supra,* in describing the process by which this Court necessarily reviews the finding by a lower appellate court that a confession was voluntarily made, Mr. Justice Frankfurter pointed out that:

> "In a case coming here from the highest court of a State in which review may be had, the first of these phases is definitely determined, normally, by that court. *Determination of what happened requires assessments of the relative credibility of witnesses whose stories, in case involving claims of coercion, are frequently, if indeed not almost invariably contradictory . . .*
>
> "This means that *all testimonial conflict* is settled by the judgment of the state courts . . . Where there are no explicit findings, or in the case of *lacunae* among the findings, the rejection of a federal constitutional claim by state criminal courts applying proper constitutional standards *resolves all conflicts* against the criminal defendant. In such instances, *we consider only the uncontested portions of the record: the evidence of the prosecution's witnesses and so much of the evidence as, fairly read in the context of the record as a whole, remains uncontradicted.*"

Id. at 603-604. (Emphasis added) (Citation omitted).

It is clear then from the record below that the trial court's rejection of the Petitioner's claim that his consent

was involuntarily given did not turn on a credibility choice to resolve any testimonial conflict for the simple reason that there were no testimonial conflicts to resolve. Had the State opted to call their police officers to the stand to contradict the Petitioner's assertions that law enforcement's overreaching eventually caused him to submit to a chemical test after his eighteen requests for counsel had gone unheeded, the trial judge's rejection of the Petitioner's claim would have been essentially unreviewable as being a credibility determination solely within the purview of the trier of fact. *Culombe v. Connecticut, supra,* at 603. That, however, is clearly not the case here.

Because this record contains no such testimonial conflict on the strength of the Petitioner's uncontradicted and unrebutted testimony, the First Court of Appeals decision affirming the trial court's rejection of the Petitioner's claim clearly is at odds with this Court's pronouncement over twenty-five years ago:

> *"[W]here on the uncontested external happenings, coercive forces set in motion by state law enforcement officials are unmistakably in action;* where these forces, under the prevailing states of stress, are powerful enough to draw forth a confession . . . and where he has acted as a man would act who is subjected to such an extracting process – *where this is all that appears in the record – a State's judgment that the confession was voluntary cannot stand."*

Culombe v. Connecticut, supra, at 606. (Emphasis added).

The uncontested external happenings spread upon this record plainly reveal that the Petitioner's eventual decision to submit to a breath test in this case was solely

the result of his will to resist being overborne by police. The contrary holding of the First Court of Appeals of Texas is not only far afield from the time-honored sentiments setting out the parameters of due process in *Culombe v. Connecticut, supra,* but is also at odds with this Court's pronouncements as to the State's burden in consent cases such as *Bumper v. North Carolina, supra, Scknekloth v. Bustamonte, supra,* and *United States v. Watson, supra,* at 424, ("Watson had been arrested and was in custody, but his consent was given while on a public street, not in the confines of the police station").[7]

Either reason more than justifies the granting of this Petition for Certiorari.

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[7] Petitioner acknowledges that, at first blush, there are no decisions from this Honorable Court concerning the type of consent contention here advanced. Indeed, the authorities relied upon by the Petitioner, on their face at least, focus upon confessions and consent to search. The consent issues in those cases are, upon closer examination, identical to the consent contention in the instant case. It is the preceding coerced consent that leads to the eventual confession being suppressed just as it is the preceding coerced consent that leads to the fruits of the eventual search being suppressed. In the case at bar, it is the preceding coerced consent that led to the production of a chemical test result that is violative of due process, and as such, the resultant chemical test must be suppressed. In practice, the standard of review in determining whether consent for a confession, search, or as in this case, a chemical test, is voluntary must be identical because the consent itself is identical. It is not the character of the incriminating evidence yielded that determines the application of the "totality of the circumstances" test but merely whether or not the evidence was derived as a result of a voluntary or involuntary consent.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully submits that this Honorable Court should grant this Petition for Certiorari and reverse the judgment of the Texas Court of Criminal Appeals.

Respectfully Submitted,

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APPENDIX A

Dennis Michael
McCAMBRIDGE, Appellant,

v.

The STATE of Texas, Appellee.

No. 01-84-0507-CR.

Court of Appeals of Texas,
Houston (1st Dist.).

Aug. 29, 1985.

Rehearing Denied Sept. 19, 1985.

Discretionary Review Granted
Nov. 13, 1985.

Defendant's motion to suppress results of breath-alcohol test was denied by the County Criminal Court at Law No. 3, Harris County, Jimmie Duncan, J., and defendant was found guilty of misdemeanor driving while intoxicated. Defendant appealed. The Court of Appeals, Evans, C.J., held that: (1) defendant could appeal denial of motion to suppress; (2) request by police officer that defendant take breath-alcohol test was not a critical stage in proceedings; (3) defendant's refusal to take breath-alcohol test was not protected by constitutional privilege against self-incrimination; and (4) trial court did not err in denying defendant's motion to suppress results of breath-alcohol test.

Affirmed.

Cohen, J., concurred and filed opinion.

Gary Trichter, Nelson & Mallett, Houston, for appellant.

John B. Holmes, Jr., Harris County Dist. Atty., James C. Brough, Jon Munier, Harris County Asst. Dist. Attys., Houston, for appellee.

Before EVANS, C.J., and COHEN and DUNN, JJ.

OPINION

EVANS, Chief Justice.

After a non-jury trial, the court found appellant guilty of the misdemeanor offense of driving while intoxicated and assessed his punishment at six months confinement, probated for two years, and a $200 fine.

The appellant filed a motion to suppress the results of the video-tape made and a breath-alcohol test taken at the time of his arrest in May 1984. After hearing the motion, the trial court suppressed the audio portion of the video-tape, but denied the motion to suppress the results of the breath test. Pursuant to a plea bargain agreement, the appellant then waived his right to a jury trial and pleaded guilty before the court.

In three grounds of error, the appellant contends that the trial court erred in refusing to suppress the breath test, arguing that: (1) it was obtained in violation of his right to assistance of counsel; (2) he did not knowingly, intelligently, or voiuntarily consent to the test; and (3) it was obtained in violation of his constitutional rights, because the police continued to interrogate him after he requested counsel.

As a threshold matter, the state contends that there is nothing before this Court for review, because the record does not contain a transcription of the hearing on appellant's guilty plea. The state argues that we must assume that there was some evidence presented, in addition to the breath test, that would support a conviction. It asserts that the absence of a statement of facts on the guilty-plea hearing distinguishes this case from, and makes inapplicable, *Isam v. State*, 582 S.W.2d 441 (Tex.Crim.App.1979), which held that an appellant may challenge an adverse ruling on his motion to suppress even though he later pleaded guilty to the misdemeanor charges against him. We find the state's distinction unpersuasive and overrule its contention. In *Isam*, the Court of Criminal Appeals expressly held that a defendant may seek appellate review of the denial of a pre-trial motion, despite the fact that he pleaded guilty to the misdemeanor charged. *Id.* at 444.

We first consider the appellant's contention that his motion to suppress should have been granted because he was deprived of his right to assistance of counsel. In support of this contention, appellant cites the recent decision of *Forte v. State*, 686 S.W.2d 744 (Tex.App. – Fort Worth 1985, pet. pending), which held that an accused had a limited right to assistance of counsel before having to decide whether to take or to refuse a breath test. The court concluded that this was a critical stage of the criminal pretrial proceedings and that the accused had the right to consult with a lawyer, provided that the consultation did not unreasonably delay the administration of the test. The appellant also refers to decisions of several federal courts and of other state courts that have

expressly or impliedly recognized the right to counsel in such proceedings. *See e.g., State v. Fitzsimmons,* 93 Wash.2d 436, 610 P.2d 893, *vacated on other grounds,* 449 U.S. 977, 101 S.Ct. 390, 66 L.Ed.2d 240 (1980); *State v. Welch,* 135 Vt. 316, 376 A.2d 351 (1977).

The appellant was arrested about 11 p.m., while he was driving alone and on his way home. As he was being placed in the police car at the arrest location, he asked for the assistance of a lawyer. The arresting officers replied that he could not have a lawyer until he got downtown. He was then taken to the central police station and placed in an interrogation room. Once there, the officers informed him of his right to remain silent and to have a lawyer present during questioning. The appellant again asked for a lawyer and was allowed to use the telephone

The appellant called his wife with instructions to contact an attorney, but he was told by the officers that he could not give out a telephone number for any return calls. After this abortive attempt to obtain counsel, the appellant was questioned by the officers, despite his requests that he wanted a lawyer present during the interrogation. He was allowed to telephone a second time, but his time he obtained only a busy signal. The police then continued their questioning. Appellant testified that each time he attempted to invoke his constitutional rights, the officer's attitude and tone of voice became increasingly hostile. The video interview ended abruptly, and the appellant was then taken out into the hallway, where another policemen tried to persuade him to take the breath-alcohol test. The appellant testified that he finally acquiesced and took the breath test.

A person who operates a motor vehicle on a public highway, and who is arrested for driving while intoxicated, is statutorily "deemed" to have consented to the taking of breath or blood specimens for determining the presence of alcohol concentration in the body. Tex.Rev.Civ.Sta.Ann. art. 6701*l*-5, sec. 1 (Vernon Supp.1985). The statute also defines the term "intoxicated" as meaning (a) that a person does not have the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or (b) that there is a blood-alcohol concentration of 0.10 percent or more. Tex.Rev. Civ.Stat.Ann. art. 6701*l*-1(a)(2) (Vernon Supp.1985).

The statute provides that the specimen must be taken at the request of a peace officer having reasonable grounds to believe that the person was driving while intoxicated, and that if the arrested person refuses the peace officer's request, a specimen shall not be taken. Art. 6701*l*-5, sec. 2(a). The peace officer must inform the arrested person orally and in writing that if the request for a specimen is refused, such refusal may be admissible in a subsequent prosecution and that the person's driver's license will be automatically suspended for 90 days, whether or not the person is subsequently prosecuted as a result of the arrest. Art. 6701*l*-5, sec. 2(b).

The United States Supreme Court has long upheld statutes that deem drivers to have waived certain constitutional rights as a condition of receiving a state license to drive a motor vehicle. For example, in *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927), the Court

upheld an implied-consent law that appointed a state officer as agent for service of process upon any non-resident driver who operated a motor vehicle on a public road. The Court found that the state's highway regulatory power included the power to require a driver to appoint an agent in advance of the operation of a motor vehicle on its highways, and thus, the state could declare the use of its highways to be the equivalent of such an appointment. *Id.* at 356-57, 47 S.Ct. at 633-34. *See also Breithaupt v. Abram*, 352 U.S. 432, 435 n. 2, 77 S.Ct. 408, 410 n. 2, 1 L.Ed.2d 448 (1957).

We reject appellant's contention that he had a constitutional right to refuse to submit to the breath test. In *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the United States Supreme Court held that the constitutional privilege against self-incrimination protects only "testimonial" communications. The results of blood alcohol-content tests, made from blood samples drawn from the defendant without his consent, were held to be admissible at trial, because such samples were not testimonial communications within the protection of the fifth amendment. The Court rejected claims that the procedure denied the suspect due process of law under the fourteenth amendment, violated his privilege against self-incrimination under the fifth amendment, and denied his right to counsel under the sixth amendment. The Court's rejection of the right to counsel claim is especially pertinent. It held:

> Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the

> petitioner, it was not inadmissible on [self-incrimination] privilege grounds.
>
> This conclusion also answers petitioner's claim that, in compelling him to submit to the test in face of the fact that his objection was made on the advice on counsel, he was denied his sixth amendment right to the assistance of counsel. Since petitioner was not entitled to assert the [self-incrimination] privilege, he has no greater right because counsel erroneously advised him that he could assert it. His claim is strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice, to be left inviolate. *No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented.* The limited claim thus made must be rejected.

Id. at 765-66, 86 S.Ct. at 1832-33 (emphasis added). Finally, in *South Dakota v. Neville*, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983), the Court held that evidence at trial of the defendant's refusal to provide a breath sample did not violate the fifth amendment privilege against self-incrimination.

The Texas Court of Criminal Appeals has found the scope of the Texas constitutional privilege against self-incrimination to be identical to that of the fifth amendment of the United States Constitution. *Olson v. State*, 484 S.W.2d 756 (Tex.Crim.App.1969). It has also expressly recognized the holding of *Schmerber* that only testimonial communication is constitutionally protected. *Turpin v. State*, 606 S.W.2d 907, 913-14(Tex.Crim.App.1980) (en banc).

In *Rodriguez v. State*, 631 S.W.2d 515 (Tex.Crim. App.1982), the court applied this reasoning and ruled

that, because taking a breathalyzer test was not protected testimonial communication, the failure to give *Miranda* warnings or statutory warnings, Tex.Code Crim.P.Ann. art. 38.22 (Vernon 1979), did not make evidence of breath-test results inadmissible at trial, where there was no evidence that the accused refused to take the test. 631 S.W.2d at 517.

The constitutional right to assistance of counsel attaches when adversary judicial proceedings are initiated against an accused, *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), and the government has committed itself to prosecute. 406 U.S. at 689, 92 S.Ct. at 1882. The defendant is entitled to the presence of counsel at critical confrontations with the state to assure that his right to a fair trial will be protected. *See United States v. Wade*, 388 U.S. 218, 226-27, 87 S.Ct. 1926, 1931-32, 18 L.Ed.2d 1149 (1967). But we disagree with the analysis in *Forte*, concluding that it is a critical stage in the proceedings when a police officer requests a breath test. Preparatory steps in the state's gathering evidence, such as taking fingerprints or a blood sample, have been held not to constitute a critical stage in the prosecution of the accused, *Wade*, 388 U.S. at 227-28, 87 S.Ct. at 1932-33; *see also Yates v. State*, 679 S.W.2d 534, 536 (Tex.App. – Tyler 1984, pet. ref'd).

Because the appellant's refusal to take the breath test was not constitutionally protected, and because this was not a critical stage of the prosecution against the appellant, we hold that he was not entitled to consult an attorney before deciding whether to refuse to take the breath test. We decline to follow the majority holding in

Forte v. State, and instead, we adopt the reasoning of *Schmerber*, *Kirby*, and *Wade*.

We accordingly overrule the appellant's first and third grounds of error.

We next consider appellant's second ground of error, in which he contends that the trial court erred in refusing to suppress the results of the breath test, because he did not knowingly, intelligently, or voluntarily consent to the test.

Although the statute provides that consent is effectively given by any person operating a motor vehicle under the conditions stated, it expressly states that no specimen shall be taken if the accused refuses the peace officer's request. An accused's "consent" to take the test is ineffective unless voluntarily given, which is a question of fact for the factfinder. *Turpin*, 606 S.W.2d at 914.

We may only speculate whether a person with a blood-alcohol content in excess of the statutory minimum could "knowingly and intelligently" decide whether to submit to the taking of a blood or breath specimen. But an accused's statutory right of refusal under article 6701*l*-5 does not appear to require the same kind of intelligent and knowing decision as is required for an effective waiver of the constitutional privilege against self-incrimination. Indeed, the statute authorizes the withdrawal of a specimen from a person who is "dead, unconscious, or otherwise in a condition rendering the person incapable of refusal." Art. 6701*l*-5, sec. 3(h). What the statute does seem to prohibit is the violent taking of a specimen from a resisting, conscious person who refuses

to signify his cooperation by signing the request form specified in section 2(c).

In this case, the appellant does not contend that he submitted to the breath test because of any violence or trickery on the part of the peace officers. *Compare Turpin*, 606 S.W.2d at 913-14. He contends only that he eventually agreed to take the test, because he felt pressured to do so by the officers' persistence and hostile attitudes. A police inquiry as to whether a D.W.I. suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *See Neville*, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748. The question of whether appellant's consent was knowing and voluntary was one for the trier of fact, who could reasonably have concluded that the appellant voluntarily consented to take the breath test. The trial court did not err in denying the appellant's motion to suppress. *See Tomtishen v. State*, 688 S.W.2d 138 (Tex.App. – Corpus Christi 1985, no pet.). We overrule appellant's second ground of error.

We affirm the judgment of the trial court.

COHEN, Justice, concurring.

I believe there is more to say concerning why an accused has no constitutional right to counsel in deciding whether to give a breath test, even though sec. 2(a), article 6701*l*-5 provides that no test shall be given if the accused refuses.

The *statutory* provision that no test shall be given if the accused refuses is not *constitutionally* based; indeed, refusing to give a blood or breath sample is illegal under

Texas law. Punishment is severe and mandatory. Thus, refusal to give a specimen, contrary to one's implied consent, should not be encouraged by extending to the would-be refuser the assistance of counsel. An accused is not entitled to follow counsel's advice to refuse to submit to fingerprinting, photographing or measurements, to write or speak for identification, to appear in court, to assume a stance, to walk or to make a particular gesture. *Schmerber v. California*, 384 U.S. 757, 764, 86 S.Ct. 1826, 1832, 16 L.Ed.2d 908 (1966). These are all physical evidence. None is within the protection of the Fifth Amendment, because none is testimonial, and the same is true of breath and blood samples.

The Supreme Court of California was among the first to so hold. In *People v. Sudduth*, 65 Cal.2d 543, 421 P.2d 401, 55 Cal.Rptr. 393 (1966), *cert. denied*, 389 U.S. 850, 88 S.Ct. 43, 19 L.Ed.2d 119 (1967), Chief Justice Roger Traynor held that evidence could be admitted showing that a defendant refused a chemical test. He wrote:

> The sole rationale for the rule against comment on a failure to testify is that such a rule is a necessary protection for the exercise of the underlying privilege of remaining silent [citing *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)]. A wrongful refusal to cooperate with law enforcement officers does not qualify for such protection. A refusal that might operate to suppress evidence of intoxication, which disappears rapidly with the passage of time, should not be encouraged as a device to escape prosecution.

421 P.2d at 403 (citations omitted). *Sudduth* was decided only six months after the U.S. Supreme Court decision in *Schmerber v. California*. At least five state supreme courts

had reached the conclusion of *Schmerber* and *Sudduth* years earlier, and more soon followed the same reasoning. *State v. Durrant*, 55 Del. 510, 188 A.2d 526 (1963); *State v. Bock*, 80 Idaho 296, 328 P.2d 1065 (1958); *Alldredge v. State*, 239 Ind. 256, 156 N.E.2d 888 (1959); *State v. Benson*, 230 Iowa 1168, 300 N.W. 275 (1941); *Gardner v. Commonwealth*, 195 Va. 945, 81 S.E.2d 614 (1954). Decisions after *Sudduth* reaching the same conclusion include *State v. Dugas*, 252 La. 345, 211 So.2d 285 (1968); *State v. Meints*, 189 Neb. 264, 202 N.W.2d 202 (1972); *State v. Cary*, 49 N.J. 343, 230 A.2d 384 (1967); *City of Westerville v. Cunningham*, 15 Ohio St.2d 121, 239 N.E.2d 40 (1968); *Commonwealth v. Robinson*, 229 Pa.Super. 131, 324 A.2d 441 (1974); *State v. Miller*, 257 S.C. 213, 185 S.E.2d 359 (1971); *City of Waukesha v. Godfrey*, 41 Wis.2d 401, 164 N.W.2d 314 (1969).

These cases all hold that evidence of refusal to take a chemical test may be admitted in evidence without violating any right protected by the United States Constitution. They proceed on the theory that the refusal is wrongful, that the consent to extraction of a sample is given by the act of driving, and that no lawful choice is available to the driver at the time testing is sought. This reasoning would lead, as in *Schmerber*, to the conclusion that "no issue of counsel's ability to assist petitioner in respect of any of the rights he did possess is presented." 384 U.S. at 766, 86 S.Ct. at 1833.

Even those who advocate the right to counsel in these circumstances recognize the heavy weight of authority rejecting it. *See, e.g.*, R. Irwin, 3 *Defense of Drunk Driving Cases*, secs. 32.03, 33.06 (3d ed. 1980 and Supp.1981). Irwin writes:

> However, it must be noted that in the majority of jurisdictions governed by implied consent legislation which provides that a motorist is deemed to have consented to submit to a test by the very act of driving on public roads or within the State, it has been held that he has no right to the assistance of counsel before making a decision to decline because he has no legal right to refuse.

That the Texas Legislature did not intend to protect the refuser is demonstrated by the penalty imposed for refusing, suspension of the driver's license for 90 days. Article 6701*l*-5, sec. 2(f). The suspension is mandatory and is not excused by the fact that the refuser may have prevailed or never been prosecuted for the crime of driving while intoxicated.

It is inaccurate to refer to the provision in sec. 2(a) as a "right" to refuse. The statute says only that if a person under arrest refuses to give a specimen, "none shall be taken." It does not mention a "right to refuse" or any other "right." Any purported "right" so harshly penalized for its exercise is obviously very limited and entitled to little protection. Rather, the required abandonment of attempts at chemical testing merely expresses the legislature's decision against state sanctioned police violence that would otherwise result when citizens refused to give a specimen of blood or breath. The statutory recognition of the driver's de facto physical ability to conceal and destroy evidence by refusing to give a sample does not create a "right." The driver merely has the physical power to do a wrongful act, which is not the same as a "right" to do so. Thus, in *Bush v. Bright*, 264 Cal.App.2d 788, 71 Cal.Rptr. 123 (1968), the court held:

> It is firmly established that Bush has *no right* to resist or refuse such a test [citing *Schmerber v. California*]. It is simply because such a person has the *physical power* to make the test impractical and dangerous to himself and those charged with administering it, that it is excused upon an indication of his unwillingness.
>
> The court concluded:
>
> The obvious reason for acquiescence in the refusal of such a test by a person who as a matter of law is "deemed to have given his consent" is to avoid the violence which would often attend forcible tests upon recalcitrant inebriates.

71 Cal.Rptr. at 124-25 (emphasis in original). *See also Campbell v. Superior Court*, 106 Ariz. 542, 479 P.2d 685 (1971) (following *Bush v. Bright*); *State v. Miller*, 185 S.E.2d at 360 ("appellant urges that by the terms of [the implied consent law] he had the statutory right to refuse. . . . [W]e do not so construe the statute, which simply opts against forcible testing.") Decisions of courts throughout the nation following and rejecting the rule in *Bush v. Bright* are analyzed in Cohen, *The Case for Admitting Evidence of Refusal to Take a Breath Test*, 6 Texas Tech.L. Rev. 927, 932-36 (1975).

Another reason why the suspect should not be constitutionally entitled to counsel before deciding whether to give a specimen is that unlawfully refusing to give a sample destroys evidence, because alcohol is quickly removed from the body with the passage of time. The unlawful refusal thus "closely resembles . . . flight, escape, or destruction of evidence." Cohen, *supra*, at 944, cited with approval in *Dudley v. State*, 548 S.W.2d 706, 716 (Tex.Crim.App. 1977) (Roberts, J. dissenting). The U.S.

Supreme Court has specifically referred to the human body's elimination of alcohol, combined with the suspect's wrongful refusal to provide a sample, as "destruction of evidence," justifying a warrantless search. *Schmerber v. California*, 384 U.S. at 770, 86 S.Ct. at 1835. While one may have the physical power to destroy evidence and may avoid prosecution by doing so, there should be no right to counsel's advice in making the decision. The severe, mandatory sanction of license suspension for 90 days effectively "equates a refusal with guilt and expresses a strong policy to protect the public from the threat of drunk driving,. . . ." *People v. Paddock*, 29 N.Y.2d 504, 272 N.E.2d 486, 487, 323 N.Y.S.2d 976, 977-78 (1971) (Jasen, J. concurring). It underscores the illegality of the refusal and the impropriety of surrounding with constitutional protections an act not constitutionally protected.

APPENDIX B

Dennis Michael McCAMBRIDGE, Appellant,

v.

The STATE of Texas, Appellee.

No. 1086-85.

Court of Criminal Appeals of Texas, En Banc.

May 14, 1986.

Defendant was convicted in the County Criminal Court At Law #3, Harris County, Jimmie Duncan, J., of misdemeanor driving while intoxicated and he appealed. The Houston Court of Appeals, First Supreme Judicial District, Evans, C.J., 698 S.W.2d 390, affirmed and defendant petitioned for discretionary review. The Court of Criminal Appeals, Campbell, J., held that: (1) defendant had no federal constitution right to counsel before deciding whether to provide breath samples for intoxilyzer test conducted prior to formal initiation of judicial proceedings; (2) officers did not interrogate defendant after he invoked his right to counsel; and (3) officers were not precluded from collecting breath sample from defendant suspected of driving while intoxicated after defendant invoked his right to counsel under *Miranda*.

Opinion of Court of Appeals vacated and cause remanded.

Onion, P.J., and Clinton, J., concurred in result.

Teague, J., dissented and filed opinion.

J. Gary Trichter, Houston, for appellant.

John B. Holmes, Jr., Dist. Atty. and James C. Brough and Jon Munier, Asst. Dist. Attys., Houston, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

CAMPBELL, Judge.

Appellant was convicted on a plea of guilty of the offense of driving while intoxicated. Punishment was assessed at six months confinement in jail and a $200.00 fine, probated for two years. The First Court of Appeals affirmed the conviction, holding that the trial court properly denied appellant's motion to suppress the results of his intoxilyzer test. *McCambridge v. State*, 698 S.W.2d 390, (Tex.App.-Houston [1st] 1985). We granted appellant's petition for discretionary review to decide 1) whether appellant has a right to counsel[1] before deciding to provide a breath sample for an intoxilyzer test, and 2) whether the State's use of appellant's breath sample, obtained after appellant responded to *Miranda* warnings with a request for counsel, violated the prophylactic safeguards established by *Miranda v. Arizona*, 384 U.S. 436, 86

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[1] Mirroring his first ground of error before the Court of Appeals, appellant relies upon the following sources for his right to counsel: 1) the right to counsel clauses of federal and state constitutions, U.S. Const. amend VI, Tex.Const. art. I, § 10, 2) the Due Process Clause, U.S. Const. amend XIV, and 3) the Due Process Clause, U.S. Const. amend XIV, and 3) the Due Course of Law Clause, Tex.Const. art I, § 19.

S.Ct. 1602, 16 L.Ed.2d 694 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).[2] We remand.

Appellant was arrested on May 21, 1984, at approximately 11 p.m., by two Houston police officers for suspicion of driving while intoxicated. At the scene of his arrest, appellant requested an attorney. The arresting officers told appellant he would have to wait until he was downtown before receiving the aid of an attorney. Appellant was then transported to the Houston Police Department and taken to a videotaping room. See V.A.C.S., art 6701*l*-1 note, (Supp.1986). Videotaping began, and appellant was given *Miranda* warnings in the presence of three police officers. Appellant responded by stating that he wanted to consult with his attorney. Appellant was given an opportunity to contact an attorney by telephone. However, his attempt was unsuccessful.[3]

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[2] Appellant, in a footnote to his brief, also argues in passing that Texas statutory law codifies *Miranda* warning requirements and provides greater protection than *Miranda v. Arizona*, supra. Appellant cites Articles 1.02, 1.05, & 15.17, V.A.C.C.P. See also Art. 38.22, V.A.C.C.P. However, we did not grant review on the basis of statutory *Miranda* warning requirements. Our grant of review was strictly limited to the application of *Miranda v. Arizona*, supra and *Edwards v. Arizona*, supra, to the instant case.

[3] Houston police officers were present throughout appellant's telephone conversation. Appellant contacted his wife and named two attorneys for her to contact, hoping that one of the attorneys could refer her to a local criminal attorney in Houston who could be retained by appellant. However, appellant was not allowed to provide his wife with a callback number.

After appellant completed his phone call, the police officers resumed questioning appellant. Appellant again requested that an attorney be present. The officers granted appellant another opportunity to contact an attorney. Appellant attempted to re-call his wife, but the line was busy. An officer then resumed questioning appellant. Appellant again asked for an attorney, but the questioning continued. Appellant requested counsel seven more times, but questioning continued.[4]

Upon appellant's eleventh request for an attorney, the officers abruptly concluded the videotaping of appellant and took appellant outside the videotaping room and into the hallway. While in the hallway, appellant was asked repeatedly whether he would provide a breath sample to determine alcohol concentration. See V.A.C.S., art. 6701*l*-5, § 1 (Supp.1986). Appellant continued to request an attorney. After five to ten minutes, appellant agreed to provide a breath sample for use in an intoxilyzer test.

Prior to taking a breath sample from appellant, an intoxilyzer operator advised appellant of the required statutory breath test warnings.[5] Appellant again agreed

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[4] During the hearing on his motion to suppress, appellant testified repeatedly, "They continued to question me." Nothing in the record indicates the *content* of that questioning. The record does not include the videotape of appellant being questioned.

[5] Article 6701*l*-5, § 2(b), supra, in pertinent part, provides:

> Before requesting a person to give a specimen, the officer shall inform the person orally and in

(Continued on following page)

to provide a breath sample, stating to the intoxilyzer operator that "he would then take the test because the [concern over losing his] driver's license."[6] On May 22, 1984, at 2:24 a.m., a complaint and an information were filed again appellant, charging him with driving while intoxicated. See Arts. 2.04 & 2.05, V.A.C.C.P.

Before trial, appellant sought to suppress the videotapes of his arrest and the results of the breath test. At the conclusion of the hearing on appellant's motion to suppress, the trial court suppressed the audio portion of the videotape. The trial court overruled appellant's motion to suppress as it applied to the remainder of the videotape and the results of the intoxilyzer test. Appellant then pled

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(Continued from previous page)

> writing that if the person refuses to give the specimen, that refusal may be admissible in a subsequent prosecution, and that the person's license, permit, or privilege to operate a motor vehicle will be automatically suspended for 90 days after the date of adjournment of the hearing provided for in Subsection (f) of this section, whether or not the person is subsequently prosecuted as a result of the arrest. . . . The officer shall inform the person that the person has a right to a hearing on suspension . . . if, not later than the 20th day after the date on which the notice of suspension . . . is received, the department receives a written demand that the hearing be held.

[6] Appellant, in his brief, argues that he eventually agreed to provide a breath sample only because of continuous pressure applied by police officers. The trial court denied appellant's motion to suppress the test on that basis. The Court of Appeals overruled appellant's ground of error on the voluntariness of his consent. *McCambridge*, supra, at 394-95. We denied review on that same issue.

guilty with the agreement that he could appeal the trial court's order.[7] See Art. 44.02, V.A.C.C.P.; *Morgan v. State*, 688 S.W.2d 504 (Tex.Cr.App.1985).

I. Right to Counsel

Relying upon three Supreme Court cases,[8] the Court of Appeals overruled appellant's first ground of error, in which appellant argued that he had a right to counsel before deciding whether to provide a breath sample for an intoxilyzer test. *McCambridge*, supra, at 394.[9] Although

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[7] Although the record does not reflect what evidence could have been used to convict appellant, appellant agreed to plead guilty only if the results of the intoxilyzer test were not suppressed. Presumably, the result of the test was sufficient to convict appellant of driving while intoxicated. See V.A.C.S., art. 6701*l*-1(a)(2)(B) (Supp.1986). Nothing in the record indicates that the videotape contained evidence of appellant's guilt. See n. 4, *ante*, at 2.

[8] *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), and *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

[9] In its opinion, the Court of Appeals discussed and overruled grounds of error one and three together, *id.*, despite the distinctly separate constitutional theories argued in each ground of error. See grounds of review one and two, respectively, *ante*, at 500 & n. 1. Although such a consolidated discussion makes it difficult to determine the exact reason for affirmance, the opinion is sufficiently clear for this Court to rely upon.

(Continued on following page)

the Court of Appeals did not explicitly state that it was only addressing a particular federal constitutional provision, given the court's reliance on the above Supreme Court opinions, it is clear that the decision to affirm was grounded upon appellant's argument that he had a Sixth

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In the future, for issues relying upon disjunctive federal and state authority, appellate courts should be careful to address each ground of error separately and clearly indicate the reason for the outcome. This practice has become even more necessary in light of the recent focus upon state, rather than federal, constitutional authority. See S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex.L.Rev. 1141 (1985); Comment, *Individual Rights and State Constitutional Interpretations: Putting First Things First*, 37 Baylor L.Rev. 493 (1985). See also *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201, 1214 (1983) (Supreme Court will undertake review of state court decision unless "state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent [state] grounds. . . .").

In his brief before the Court of Appeals and this Court, appellant provided several constitutional bases for each ground of error and review. Attorneys, when briefing constitutional questions, should carefully separate federal and state issues into separate grounds and provide substantive analysis or argument on each separate ground. If sufficient distinction between state and federal constitutional grounds is not provided by counsel, this Court may overrule the grounds as multifarious. Art. 40.09(9), V.A.C.C.P.; *Brooks v. State*, 642 S.W.2d 791, 793 (Tex.Cr.App.1982) ("by combining more than one contention in a single ground an appellant risks rejection on the ground for presenting nothing for review.") But see art. 44.33, r. 306(d), V.A.C.C.P., and cf. *State v. Jewett*, 500 A.2d 233 (Vt.1985) (appellate courts may require supplemental briefs if state constitutional issue not sufficiently developed).

Amendment right to counsel.[10] Appellant's remaining federal and state constitutional arguments claiming a right to counsel were left unaddressed.

This Court recently held that the right to counsel under the Sixth Amendment attaches only upon or after formal initiation of judicial proceedings. *Forte v. State*, 707 S.W.2d 89, 91 (Tex.Cr.App.1986). Therefore, our determination in the instant case whether the Court of Appeals correctly decided that appellant was not denied his Sixth Amendment right to counsel only depends upon when formal adversary proceedings were initiated. *Id.*[11]

Appellant was arrested at approximately 11 p.m. on May 21, 1984. Appellant then provided the police with a breath sample *prior* to a complaint and an information being filed at 2:42 a.m. on May 22, 1984, thus charging appellant with driving while intoxicated. Appellant's Sixth Amendment right to counsel did not attach until the complaint and information were filed. See *Forte*, supra, at

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[10] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S.Const. amend VI.

[11] The Court of appeals held that appellant's decision to provide a breath sample did not constitute a "critical" stage, thus not triggering a right to counsel. *McCambridge*, supra, at 394. We disagree with that holding insofar as it implies that a "critical" stage may arise prior to initiation of formal adversary proceedings. See *Forte*, supra, at 92 ("critical" stage analysis *only arises after formal initiation of adversary proceedings*), and cases cited therein.

(All emphasis is supplied by the author of this opinion unless otherwise indicated.)

92. Therefore, we find no denial of appellant's Sixth Amendment right to counsel.

As we noted earlier, appellant also argued to the Court of Appeals that his right to counsel was denied under "right to counsel" provision of the state constitution, Tex. Const. art. I, § 10, the Due Process Clause, U.S. Const. amend. XIV, and the Due Course of Law Clause, Tex. Const. art. I, § 19.[12] In his supplemental brief, appellant requests that we decide the instant case on the basis of independent state constitutional authority. We decline to do so at this point because the Court of Appeals affirmed appellant's conviction only on the basis that his Sixth Amendment right to counsel was not denied. Therefore, in order to give the Court of Appeals an opportunity to address all of appellant's constitutional arguments before this Court decides such an important question of state law, we will remand the case for consideration of appellant's remaining state and federal constitutional arguments in his first ground of error. See generally *Eisenhauer v. State*, 678 S.W.2d 947 (Tex.Cr.App.1984). However, we must first determine whether appellant's remaining ground of review, based on a *Miranda* violation, has merit.

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[12] In an amicus brief to this Court, the National Association of Criminal Defense Attorneys also argues that state and federal law give a defendant the right to counsel "at a time no later than when the arresting officers requests the DWI suspect to submit to a chemical test of his blood, breath, or urine." In a second amicus brief to this Court, the Texas Trial Lawyers Association argues that due process requires that a defendant be given access to counsel prior to sobriety testing.

II. Violation of *Miranda* and *Edwards*.

The Court of Appeals overruled appellant's third ground of error, which claimed that police officers violated the prophylactic safeguards of *Miranda v. Arizona*, supra, and *Edwards v. Arizona*, supra, by continuing to ask appellant for a breath sample despite his request for counsel. In holding that no violation had occurred, the Court of Appeals relied upon, inter alia, *Schmerber v. California*, supra, and *South Dakota v. Neville*, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983).

In *Schmerber v. California*, supra, a blood sample was extracted from a defendant by a physician without the defendant's consent. The defendant claimed that his Fifth Amendment privilege against self-incrimination was violated.[13] The Supreme Court first noted that, generally, "the privilege is a bar against compelling 'communications' or 'testimony,' but . . . compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Id.*, 384 U.S. at 764, 86 S.Ct. at 1832. The Court then held that neither the extraction of blood nor the subsequent chemical analysis of the blood for alcohol concentration required appellant to *testimonially incriminate* himself in violation of the Fifth Amendment. 384 U.S. at 765, 86 S.Ct. at 1833. In its holding, the Court acknowledged that the defendant was compelled to provide a sample of his blood. *Id.* However, the Court held that the Fifth Amendment privilege against self-incrimination does not protect all types of

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[13] "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const. amend V.

compulsion – only compulsion directed at producing evidence from a defendant's own mouth. *Id.* That Court did not address whether the *Miranda* warning requirement was affected by the absence of a Fifth Amendment privilege against self-incrimination.

This Court has subsequently analogized the extraction of blood in *Schmerber v. California*, supra to the collection of a breath sample. *Rodriguez v. State*, 631 S.W.2d 515, 517 (Tex.Cr.App.1982). In doing so, we held that providing a breath sample for chemical analysis of alcohol concentration is not a testimonial communication protected by the privilege against self-incrimination under the Fifth Amendment. *Id.* In the absence of any need to protect a defendant's privilege against self-incrimination, we further held that police officers are not required to give a suspect *Miranda* warnings prior to asking him to provide a breath sample. *Id.*

In *South Dakota v. Neville*, supra, a defendant's refusal to participate in a blood-alcohol test was used as substantive evidence against him at his trial. The defendant argued, inter alia, that the use of the refusal against him at his trial violated his Fifth Amendment privilege against self-incrimination. The Supreme Court avoided the notion that Neville's refusal was a physical act rather than a testimonial act, *id.* 459 U.S. at 561-62, 103 S.Ct. at 921-22, relying instead on the freedom of the defendant to refuse the test,[14] and held that his choice of refusal was

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[14] Texas law gives a suspect a similar choice. V.A.C.S., arts. 6701*l*-5, §§ 1-2 (Supp.1986). See *Forte*, supra, at 91, n. 2.

"not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination." *Id.* 459 U.S. at 564, 103 S.Ct. at 923.

In *South Dakota v. Neville,* the Court also decided whether *Miranda* protections extended to a defendant's decision whether to provide a blood sample for chemical analysis. The Court stated:

> In the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*. As we stated in *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980), police words or actions "normally attendant to arrest and custody" do not constitute interrogation. The police inquiry here is highly regulated by State law, and is presented in virtually the same words to all suspects.[15] It is similar to a police request to submit to fingerprinting or photography. Respondent's choice of refusal thus enjoys no prophylactic *Miranda* protection outside the basic Fifth Amendment protection. See generally Argenella, *Schmerber* and the Privilege Against Self-Incrimination: A Reappraisal, 20 Am.Crim.L.Rev. 31, 56-58 (1982).

South Dakota v. Neville, 459 U.S., at 564, n. 15, 103 S.Ct. at 923, n. 15. Thus, a defendant, when faced with a decision whether to provide a breath or blood sample for chemical analysis of alcohol concentration, see V.A.C.S., art. 6701*l*-5, § 1, may not avoid making a decision by invoking

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[15] Texas law requires that police give specific warnings. V.A.C.S., art. 6701*l*-5, § 2(b)-(e).

the protection of the Fifth Amendment privilege against self-incrimination or the prophylactic safeguards of *Miranda*.[16]

Appellant, in his petition for discretionary review, acknowledges that *Miranda* warnings are not required before police may ask a suspect to provide a breath sample. In fact, appellant concedes that he never intended to argue to the Court of Appeals that *Miranda* warnings were required. Instead, appellant argues that the right to counsel under *Miranda*, though not initially required, must be applied in the instant case because the police *did* inform appellant that he had a right to have counsel present during "questioning." In appellant's words, "[i]t is one thing to not require the warnings be given by police because the chemical test does not equate

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[16] We do not imply that the breath testing decision is free from all constitutional or statutory protection.

" . . . [D]ue process concerns could be involved if the police initiated physical violence while administering the test, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force." *South Dakota v. Neville*, 459 U.S., at 559, n. 9, 103 S.Ct. at 920, n. 9, citing *Schmerber v. California*, 384 U.S. 757, 761, n. 4, 86 S.Ct. 1826, 1830, n. 4, 16 L.Ed.2d 908, 914, n. 4 (1966). However, appellant has not argued that his submission to an intoxilyzer test raised due process concerns of this nature. Nor have we accepted review on that issue.

State law also requires that a suspect's refusal to provide a breath sample be strictly honored. V.A.C.S., art. 6701*l*-5, § 2(a), (Supp.1986); *Turpin v. State*, 606 S.W.2d 907, 913-914 (Tex.Cr.App.1980). However, the issue of the voluntariness of appellant's consent also is not before us in the instant case. See n. 7, *ante*, at 501.

to testimonial communication, but it is an entirely different matter where the warnings *are* given by police, then invoked by a defendant and thereafter deliberately ignored by police" (emphasis supplied by appellant). We disagree.

The Supreme Court recently reviewed the basis for its decision in *Miranda v. Arizona:*

> In *Miranda v. Arizona,* the Court recognized that custodial interrogations, by their very nature, generate "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S., at 467 [86 S.Ct. at 1624]. To combat this inherent compulsion, and thereby protect the Fifth Amendment privilege against self incrimination, *Miranda* imposed on the police an obligation to follow certain procedures in their dealing with the accused. In particular, prior to the initiation of questioning, they must fully apprise the suspect of the state's intention to use his statements to secure a conviction, and must inform him of his rights to remain silent and to "have counsel present . . . if [he] so desires." *Id.*, at 468-470 [86 S.Ct. at 1624-1626]. Beyond this duty to inform, *Miranda* requires that the police respect the accused's decision to exercise the rights outlined in the warnings. "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, [or if he] states that he wants an attorney, the interrogation must cease." *Miranda,* 384 U.S., at 473-474 [86 S.Ct. at 1627]. See also *Edwards v. Arizona,* 451 U.S 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

Moran v. Burbine, ___ U.S. ___, ___, 106 S.Ct. 1135, 1140-1141, 89 L.Ed.2d 410 (1986).

The Supreme Court also recently reviewed the basis for its decision in *Edwards v. Arizona:*

> In *Edwards v. Arizona*, 451 U.S. 477 [101 S.Ct. 1880, 68 L.Ed.2d 378] (1981), we held that an accused person in custody who has "expressed his desire to deal with police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.*, at 484-485 [101 S.Ct. at 1884-1885]. In *Solem v. Stumes*, 465 U.S. 638 [104 S.Ct. 1338, 79 L.Ed.2d 579] (1984), we reiterated that "*Edwards* established a bright-line rule to safeguard pre-existing rights," *id.*, at 646 [104 S.Ct. at 1343][;] "once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him." *Id.*, at 641 [104 S.Ct. at 1340].

Michigan v. Jackson, ___ U.S. ___, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986).

In summarizing the rationales of *Miranda v. Arizona*, supra, and *Edwards v. Arizona*, supra, the Supreme Court has continued to emphasize that *Miranda* protections are aimed at dissipating the inherently coercive atmosphere associated with custodial interrogations. *Miranda* warnings inform a suspect of the procedural tools available to him in the face of coercive interrogation. One of those tools is the right to request a lawyer, thus allowing a defendant to end the interrogation or guarantee the assistance of a third party. Therefore, "[t]he Fifth Amendment

right identified in *Miranda* is the right to have counsel present at any custodial interrogation." *Edwards v. Arizona*, 451 U.S., at 486, 101 S.Ct., at 1885.

In the instant case, police officers complied with the requirements of *Miranda v. Arizona*, supra, and *Edwards v. Arizona*, supra. The trial court did suppress the audio portion of the videotape, finding that the police officers continued to "question" appellant after he invoked his right to counsel. However, there is nothing in the record to indicate that the continued questioning of appellant constituted "interrogation" within the meaning of *Miranda* or that the questions resulted in any incriminating response by appellant. The only evidence of the content of that questioning came from appellant during the hearing on his motion to suppress. Appellant testified, "They continued to question me." Although the videotape of police officers questioning appellant might provide more revealing evidence of the nature of the questioning, it has not been included in the record on appeal. We are bound by the record on appeal as presented to us. *Evans v. State*, 622 S.W.2d 866 (Tex.Cr.App.1981). Given the record presented to this Court, appellant has not shown that he was ever interrogated within the meaning of *Miranda*. Questioning "normally attendant to arrest and custody" is not interrogation. *Rhode Island v. Innis*, supra. Therefore, there is no evidence in the record to support the conclusion that the police officers ignored appellant's right to have counsel present for custodial interrogation.

We acknowledge that the legal distinction between questioning that amounts to interrogation and questioning that is "normally attendant to arrest and custody" may not always be readily apparent. See *Rhode Island v.*

Innis, supra; *Paez v. State*, 681 S.W.2d 34, 36 (Tex.Cr.App.1984). In an arrest for driving while intoxicated, police may create some additional confusion by giving *Miranda* warnings without informing a defendant that those warnings do not apply to his decision whether to provide a breath sample. However, given the instant facts, the remedy for such confusion cannot be found in *Miranda* or *Edwards*.[17]

Appellant argues that, even if *Miranda* warnings do not presently provide protection under the instant circumstances, the prophylactic safeguards of *Miranda* and *Edwards* should be extended to prevent a suspect's confusion in a breath test situation. Specifically, appellant argues that *Edwards v. Arizona*, supra, should be extended to require that police cease questioning a suspect on any subject, whether such questioning constitutes "technical" interrogation or not, once the suspect has requested counsel following *Miranda* warnings. We disagree.

The Supreme Court was recently asked to extend *Miranda* protections to require police to inform a suspect of an attorney's efforts to reach him during custodial interrogation. The Court, in rejecting an extension, struck at the very heart of appellant's instant contention:

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[17] A different question might be presented if the police officer, in ignoring appellant's request for counsel under *Miranda*, had mixed his request for a breath sample with questions that amounted to interrogation. In the absence of such a probable *Miranda* violation, we need not decide under what circumstances a suspect's consent to provide a breath sample is the fruit of an illegal interrogation.

> . . . [R]eading *Miranda* to forbid police deception of an *attorney* "would cut [the decision] completely loose from its own explicitly stated rationale." *Beckwith v. United States*, 425 U.S. 341, 345 [96 S.Ct. 1612, 1615, 48 L.Ed.2d 1] (1976). As is now well established, "[t]he . . . *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the [suspect's] right against compulsory self-incrimination [is] protected.' " *New York v. Quarles*, 467 U.S. 649, 654 [104 S.Ct. 2626, 2631, 81 L.Ed.2d 550] (1984), quoting *Michigan v. Tucker*, 417 U.S. 433, 444 [94 S.Ct. 2357, 2364, 41 L.Ed.2d 182] (1974). Their objective is not to mold police conduct for its own sake. Nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials wholly unconnected to any federal right or privilege. The purpose of the *Miranda* warnings instead is to dissipate the compulsion inherent in custodial interrogation and, in doing so, guard against abridgement of the suspect's Fifth Amendment rights. Clearly, a rule that focuses on how the police treat an attorney – conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation – would ignore both *Miranda*'s mission and its only source of legitimacy.

Moran v. Burbine, ___ U.S., at ___, 106 S.Ct. at 1143.

In the instant case, reading *Edwards v. Arizona*, supra, to forbid police from seeking a suspect's breath sample, once the suspect has invoked his right to counsel under *Miranda*, would similarly divorce *Miranda* from its "only source of legitimacy." Not only does the breath testing decision not involve custodial interrogation, it also does not involve the privilege against self-incrimination. A rule that focuses on preventing collection of a breath

sample, merely because a defendant has been informed of his right to have counsel present if he is interrogated, would severely restrict police officers in the pursuit of lawfully collecting evidence of intoxication and, more significantly, do nothing to further protect the privilege against self-incrimination. Therefore, we find that appellant, under the instant facts, has no remedy under *Miranda v. Arizona*, supra, or *Edwards v. Arizona*, supra.[18]

The judgment of the Court of Appeals is vacated and the cause is remanded to the Court of Appeals for further consideration of appellant's ground of error claiming a right to counsel under the Fourteenth Amendment to the United States Constitution and Article I, §§ 10 and 19 of the Texas Constitution.

ONION, P.J., and CLINTON, J., concur in result.

TEAGUE, Judge, dissenting.

This Court granted the appellant's petition for discretionary review to review two of the three grounds of

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[18] In finding appellant has no remedy under *Miranda v. Arizona*, supra, or *Edwards v. Arizona*, supra, we do not imply that a remedy will never be available to a suspect who is confused when faced with *Miranda* warnings and a breath testing decision without the benefit of requested counsel. We are simply limiting our decision in the instant case to the issues and remedy requested by appellant in his petition for review.

The legislature is free to enlarge upon the statutory warnings required at present, thus requiring a police officer to inform a suspect that *Miranda* warnings do not apply to the breath testing decision. See art. 6701*l*-5, § 2(b), supra. However, we believe it would be inappropriate for this Court to make such an expansion of statutory warnings absent legislative authority.

review he presented therein, namely: "(1) The trial court and the First Court of Appeals erred in not suppressing appellant's intoxilyzer breath test result as it was derived in violation of his right to assistance of counsel," *and* "(2) The trial court and the First Court of Appeals erred in not suppressing appellant's intoxilyzer breath test result as it was derived after appellant requested counsel and in violation of the prophylactic safeguard *established* by *Miranda v. Arizona*, [384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)], and *Edwards v. Arizona*, [451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)], requiring police to cease all interrogation where a person in custody requests counsel." (My emphasis.)

I dissent first to footnote 2 of the majority opinion, which states the following: "Our grant of review was strictly limited to the *application* of *Miranda v. Arizona*, supra, and *Edwards v. Arizona*, supra, to the instant case." (My emphasis.) Our grant of review did no such thing.

After reading the majority opinion, it appears to me that the new rule is that after this Court has granted a petition for discretionary review, it is now necessary for the appealing party to prepare for this Court a proposed opinion, and this Court will be bound by the four corners doctrine in deciding whether to approve or disapprove the opinion. I must confess: I am unfamiliar with any such doctrine. In light of what this Court has been doing of late, see *post*, it would appear that after granting a petition for discretionary review, we should now take a vote on whether a majority of this Court believes that the opinion by the court of appeals could be better written and, if a majority of this Court decides it could, then we simply remand the cause back to the court of appeals for

it to rewrite its opinion. That is basically what is happening today.

Today, as members of law enforcement, the Bench and Bar of this State anxiously await our decision on whether an accused, who has been arrested for driving while intoxicated, has a limited statutory or constitutional right to counsel before deciding whether to submit to an intoxilyzer test, but as we erroneously did on April 9, 1986, when we remanded the cause of *Forte v. State*, 707 S.W. 89 (Tex.Cr.App., 1986), to the Fort Worth Court of Appeals, we once again pussyfoot around by remanding this cause to the Houston First Court of Appeals, in order for it to do what it has already done, implicitly if not expressly. This is neither judicial efficiency nor judicial economy at its best.

Come on Brethren, let's quit beating around the bush and decide the issue, whether a person arrested for driving while intoxicated has either a constitutional or statutory limited right to counsel. Just because this Court goofed just a couple of days ago in *Forte v. State*, supra, by remanding that cause to the Fort Worth Court of Appeals for that court to perform a useless task, is no justification why this Court should continue to goof.

The record reflects that Dennis Michael McCambridge, hereinafter referred to as the appellant, appealed the misdemeanor driving while intoxicated conviction he had sustained in the trial court to the Houston First Court of Appeals, which court affirmed his conviction. See *McCambridge v. State*, 698 S.W.2d 390 (Tex.App. – Houston [1st] 1985).

On direct appeal to the Houston First Court of Appeals, the appellant, relying primarily upon *Forte v. State*, supra, as case authority, contended that after he had invoked his right to counsel, and after he had received the *Miranda* warnings, he had the limited right to the assistance of counsel before deciding whether or not to take the intoxilyzer test. He also argued that because he was denied his right to the assistance of counsel the trial judge should have suppressed not only the audio portion of the video tape, which he did, but should have also suppressed the result of the breath test that he took, which he didn't.

The Houston First Court of Appeals, notwithstanding that the appellant relied primarily upon *Forte*, supra, as authority for his contentions, but without discussing *Forte*, supra, totally rejected what the Fort Worth Court of Appeals had held in *Forte*, supra, that an accused arrested for driving while intoxicated has the limited right to the assistance of counsel before deciding whether to take the intoxilyzer test. The Houston Court of Appeals held: "Because the appellant's refusal to take the breath test was not constitutionally protected (under the Sixth Amendment to the Federal Constitution), *and* because this was not a critical stage of the prosecution against the appellant, we hold that he was not entitled to consult an attorney before deciding whether to refuse to take the breath test." (My emphasis.)

I will first address what both this Court and the Fort Worth Court of Appeals stated in *Forte v. State*, supra.

In our *Forte*, supra, this Court stated the following: "Although the opinion of the Court of Appeals does not

specifically mention a particular federal or state constitutional provision, given its reliance upon *United States v. Wade*, supra, it is clear that the decision was upon the Sixth Amendment." This is truly a misreading of that court's opinion.

On motion for rehearing, the Fort Worth Court of Appeals, see *Forte v. State*, 686 S.W.2d 744 (Tex.App. – Ft. Worth 1985), clearly pointed out that it was relying upon *Prideaux v. State of Minnesota, Department of Public Safety*, 310 Minn. 405, 247 N.W.2d 385 (Minn.1976), not only for guidance but also for authority. *Prideaux*, supra, had interpreted a statute similar to the one in existence in Texas at the time that the appellant was arrested, but which was no longer in existence in Minnesota at the time the Fort Worth Court of Appeals handed down its opinion on rehearing. See *Nyflot v. Commissioner of Public Safety*, 369 N.W.2d 512 (Minn.1985). Note what the court of appeals expressly stated in its opinion on rehearing: "Adopting the language of that opinion (*Prideaux*, supra) we hold that any person who is required to submit to a chemical test of the alcohol content of his blood, breath, or urine shall have the right to consult with a lawyer of his own choosing before making that decision, provided that such consultation does not unreasonably delay the administration of the test." (754). Thus, the opinion by the court of appeals, just like *Prideaux*, supra, was not even decided on Federal *or* State constitutional grounds, but, instead, was decided upon State statutory grounds. The court used for guidance and authority an opinion from the Minnesota Supreme Court that had been expressly overruled by that court because of a tremendous change that had been made in the interval by the

Minnesota Legislature. However, *Prideaux*, supra, was in point because of the way the Minnesota laws were then worded and the way Texas laws were worded at the time the defendant Forte had been arrested.

This Court, in *Forte*, supra, erroneously stated the following: "Although the Court of Appeals did not explicitly state that it was only addressing a particular federal constitutional provision, given the court's reliance on the above Supreme Court opinions, it is clear that the decision to affirm was grounded upon appellant's argument that he had a Sixth Amendment right to counsel."

In *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the Supreme Court expressly stated the following: "When . . . the adequacy and independence of any possible state law grounds is . . . clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did . . . " We should adhere to this statement in interpreting opinions by courts of appeals.

Therefore, the Fort Worth Court of Appeals' opinion of *Forte v. State*, supra, should be clear to even the most myopic reader on what basis that court decided the limited right to counsel issue. Likewise, the only thing that the Houston First Court of Appeals forgot to do in its opinion was to put therein, in big, bold letters, the fact that it was relying upon decisions of the Supreme Court of the United States – not only for guidance but for authority, in stating and holding what it did. It either forgot to do that or it simply forgot to turn on the lights, so that some members of this Court could see what it had stated and held.

By taking the action that a majority of this Court votes to take today, to remand this cause to the Houston Court of Appeals, just as it took just a few days ago, to remand *Forte*, supra, to the Fort Worth Court of Appeals, we give meaning, not to the fact that criminal convictions must eventually become final, but to the fact that in Texas appeals of criminal convictions can sometimes closely resemble a ping pong game.

The Houston First Court of Appeals expressly stated in its opinion the Following: "In support of this contention (that his motion to suppress should have been granted, because he was deprived of his right to assistance of counsel), appellant cites the recent decision of *Forte v. State*, 686 S.W.2d 744 (Tex.App. – Fort Worth 1985) . . . " (P. 392 of opinion.) Thereafter, it stated and held the following: "We decline to follow the majority holding in *Forte v. State* . . . "

Therefore, our decision today should be, not to remand this cause to the Houston Court of Appeals, but, instead, to withdraw our opinion in *Forte*, supra, and decide the issue, whether the appellant had the limited right to counsel before deciding whether or not to take the breath test.

The facts of this cause reflect that after being arrested for driving while intoxicated, in response to the appellant's request for counsel, the arresting officers told him that he would have to wait until after he got downtown to the station house before he could receive the aid of an attorney. At the station house, contrary to the express provisions of Art. 15.17, V.A.C.C.P., the appellant was not

taken to a magistrate, but instead, was taken to the videotaping room of the police department. The appellant was then administered the *Miranda* warnings, and was permitted to use a telephone. Because he did not know his Dallas civil attorney's telephone number, he telephoned his wife and told her to call not only his Dallas attorney but also to telephone a friend of his who was an Assistant District Attorney of Harris County, for the purpose of being referred to a local criminal defense attorney. Thereafter, the appellant again tried to telephone his wife, but this time the line was busy. The appellant was never successful in making contact with an attorney while he was at the station house.

The record clearly reflects that at least nine times while in the videotaping room the appellant requested the assistance of counsel, but his request fell on deaf ears. After his tenth request for the assistance of counsel, the appellant was removed from the videotaping room to the hallway outside of the room, where police officers continued to ask him to submit to a breath test. Eight more times he refused. Finally, after his eighteenth request for the assistance of counsel was not honored, and probably out of desperation and believing that continued refusals would not deter the police officers from their continuing harassment to get him to take the test, as well as by now believing what the officers were telling him, i.e., that an attorney was going to screw up everything that might be done, that he would automatically be found guilty, that he would lose his driver's license, that he would go to jail, and that possibly he would lose his job, he discontinued making demands for counsel and took the intoxilyzer test.

Under our statutory law, the mere refusal to take the breath test carries both civil and criminal penalties. For example, on the criminal side, a defendant's refusal to take the test is now admissible as evidence against him as an inference of guilt in a subsequent criminal prosecution; on the civil side, a refusal to take the test results in an automatic suspension of that person's driver's license for ninety days. See Art. 6701*l*-5, Sections 2 (f) and 3(g). Thus, we are not dealing with a simple driver's license revocation case.

What the court of appeals and the parties have overlooked is the fact that the arrested person is guaranteed by the provisions of Art. 15.17, V.A.C.C.P., and Art. 38.22, Section 3, V.A.C.C.P., to be warned of his right to counsel, and if he requests counsel, under this Court's decisions, that request must be honored. Furthermore, the Texas Constitution guarantees that an accused shall not be compelled to give evidence against himself, see Art. I, Section 10, Texas Constitution. Also see *Sanchez v. State*, 707 S.W.2d 575 (Tex.Cr.App., 1986)(Clinton, J., concurring opinion).

This case, like *Forte*, supra, truly exemplifies the continuing difficulties encountered by the police in seeking to satisfy at the same time the requirements of a *Miranda* warning and the provisions of the implied consent statute. Simply stated, for law enforcement officials, the two make a bad marriage because they represent contradictory polar interests.

It is unnecessary to decide this case on constitutional grounds. The question really boils down to whether the

Legislature of this State intended a blanket denial of the right to counsel under the implied consent statute.

As previously noted, in this State, any person in police custody accused of wrongdoing is entitled to be told that he has the right to consult with an attorney, and, if he requests counsel, his request must be honored. Cf. *Dunn v. State*, 696 S.W.2d 561 (Tex.Cr.App.1985). However, under the implied consent statute, there is no such right.

Thus, under our law, the State is required to both advise the accused of his right to counsel and at the same time tell him he does not have the right to counsel. How confusing this must be to the accused. ("Didn't you tell me earlier I could call my lawyer and I don't have to answer any questions?" "And now you're saying I can't have a lawyer and I gotta take the test?" See Latzer, "The High Court vs. High Drivers: A Short Course in Logic." Vol. 21, No. 1, *Criminal Law Bulletin*, Jan. – Feb., 1985.).

In *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), the Supreme Court held that when the pretrial investigation reaches a "critical" stage, the right to counsel attaches, and "[T]he accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, *formal or informal*, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." (My emphasis.)

The majority opinion, as it did in *Forte*, supra, interprets *United States v. Gouveia*, 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984), as holding that the "critical" stage can never exist unless and until formal charges have been filed against the accused. The facts in *Gouveia*, supra,

reflect that the defendants in that cause, already serving prison sentences, were placed in administrative segregation or detention *after a hearing* because they were suspected of killing other inmates. They were subsequently formally charged with those killings. They claimed that they had the right to the assistance of counsel while they were in administrative "lock up." The Supreme Court held that they were not entitled to counsel while they were in administrative segregation and before any adversarial judicial proceedings had been initiated against them, but expressly pointed out that "The narrow issue before the Court of Appeals and before us today is whether the Sixth Amendment requires the appointment of counsel for indigent inmates *in respondents' situation*." 104 S.Ct., at 2296, fn. 1. In so holding, the Court, however, was quick to point out that the defendants had visitation privileges and the opportunity to make unmonitored phone calls to attorneys while in administrative segregation, and that in a pretrial situation where the results of the confrontation "might will settle the accused's fate and reduce the trial itself to a mere formality," *United States v. Wade*, supra, 388 U.S., at 224, 87 S.Ct., at 1930, the right to counsel may exist. 104 S.Ct., at 2298.

Thus, the unqualified statement that this Court made in *Forte*, supra, that "the Supreme Court concluded (in *Gouveia*, supra,) that the Sixth Amendment right to counsel attaches only upon or after formal initiation of judicial proceedings", given the facts and circumstances of *Gouveia*, supra, is a statement that is a far cry from being one without any qualification, restriction, or limitation. Unquestionably, the majority opinion tries to paint a big wall with a little brush that has little paint in it.

In the majority opinion's meandering type discussion of *Miranda* and *Edwards*, supra, it has overlooked the Supreme Court decision of *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), in which the court held that "a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he is arrested." 104 S.Ct., at 3148. The Court further held that "There can be no question that respondent was 'in custody' at least as of the moment he was formally placed under arrest and instructed to get into the police car. Because he was not informed of his constitutional rights at that juncture, respondent's subsequent admissions should not have been used against him." 104 S.Ct., at 3148. Also see *People v. Davie*, 96 Misc.2d 890, 410 N.Y.S.2d 222 (1978); Annot., 31 *A.L.R.3rd* 565 (1970).

In Texas, a defendant's silence or refusal to submit to a requested chemical test is a tacit or overt expression and communication of the defendant's thoughts, and thus protected by the self-incrimination clause of the Texas Constitution. *Dudley v. State*, 548 S.W.2d 706 (Tex.Cr.App.1977).

In this instance, after the appellant, who was then in custody, was informed of his *Miranda* rights he invoked his right to counsel, but the police refused to honor his request to have counsel assist him. The refusal to comply with his request violated the appellant's right to counsel under the Texas statutes. All evidence secured thereafter should have been suppressed. *Juckett v. Evergreen District Court*, 100 Wash.2d 824, 675 P.2d 599 (1984).

It is time for this Court to come to grips with all of the above, and to decide the issues that are now before this Court. Other than to do as was done in this cause, to harass the appellant until he finally agreed to submit to taking the test, police officers who arrest persons for driving while intoxicated are at a loss of just what they should do.

There is a great deal of interplay between the arresting officer giving the accused the *Miranda* warnings and also giving the accused the implied consent warnings. The two are truly paradoxical. Today unfortunately, a majority of this Court refuses to decide the important issues that are before us. We do a disservice to our men in blue by not today deciding these issues.

I dissent to remanding this causes to the court of appeals. This only reflects dilly dallying around at its best.

APPENDIX C

Dennis Michael McCAMBRIDGE, Appellant,

v.

The STATE of Texas, Appellee.

No. 01-84-0507-CR.

Court of Appeals of Texas, Houston (1st Dist.).

Jan. 29, 1987.

Rehearing Denied Feb. 26, 1987.

Driver was convicted in the County Criminal Court at Law No. 3, Harris County, Jimmie Duncan, J., of misdemeanor driving while intoxicated, and he appealed. The Houston Court of Appeals, First Supreme Judicial District, 698 S.W.2d 390, affirmed. Discretionary review was granted. The Court of Criminal Appeals, 712 S.W.2d 499, vacated and remanded. The Court of Appeals, Evans, C.J., held that: (1) the driver's rights of counsel under the Texas Constitution was not violated when he was not permitted to consult with counsel before submitting to a blood-alcohol test; (2) there was no violation of the federal due process clause or of the Texas due course of law provision; and (3) it was not necessary to review the driver's claim that he was denied his statutory right to counsel.

Judgment affirmed.

J. Gary Trichter Mallett, Trichter & Brann, Houston, for appellant.

John B. Holmes, Jr., Harris Co. Dist. Atty., William J. Delmore, III, Jon Munier, Harris Co. Asst. Dist. Attys., Houston, for appellee.

Before EVANS, C.J., and SAM BASS and COHEN, JJ.

OPINION

On Remand

EVANS, Chief Justice.

The appellant was charged with the misdemeanor offense of driving while intoxicated. On appellant's motion, the trial court suppressed the audio portion of a video tape made after appellant's arrest, but refused to suppress the video portion or the results of a breath-alcohol test. Pursuant to a plea bargain agreement, the appellant then waived a jury trial and entered a plea of guilty. On that plea, the court found appellant guilty and assessed his punishment at six months confinement, probated for two years, and a $200 fine.

On the original submission of this appeal, the appellant contended: (1) that the breath-alcohol test was obtained in violation of his right to assistance of counsel; (2) that he did not knowingly, intelligently, or voluntarily consent to the test; and (3) that his constitutional rights were violated because the police continued to interrogate him after he requested counsel. This Court overruled appellant's contentions and affirmed the trial court's judgment. *McCambridge v. State*, 698 S.W.2d 390 (Tex.App. – Houston [1st Dist.] 1985).

The Court of Criminal Appeals granted appellant's petition for discretionary review on two issues: (1)

whether appellant had a right to counsel before deciding whether to take the breath-alcohol test, and (2) whether the State's use of the breath test results, obtained after appellant responded to *Miranda* warnings with a request for counsel, constituted a violation of the constitutional safeguards set forth in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The Court of Criminal Appeals, in an opinion delivered May 14, 1986, upheld this Court's rulings with respect to the two issues presented, holding: (1) that there was no denial of appellant's sixth amendment right to counsel because formal adversary proceedings had not been initiated against him; and (2) that the police had not violated appellant's fifth amendment rights under *Miranda* and *Edwards* by continuing to ask him whether he would willingly take the breath test. *McCambridge v. State*, 712 S.W.2d 499 (Tex.Crim.App.1986).

But the Court of Criminal Appeals further held that two additional constitutional issues were raised by appellant in his original brief, that this Court failed to rule upon in its original opinion. The Court of Criminal Appeals accordingly remanded the cause to this Court, with instructions to consider appellant's contentions that his constitutional rights had been violated under (1) the right to counsel provision of the Texas Constitution (article I, section 10), and (2) the due process clause of the United States Constitution (amendment XIV) and the due course of law provision of the Texas Constitution (article I, section 19). *Id.* at 502-03. We therefore consider those issues here.

Texas Constitution, Article I, Section 10

Essentially, the appellant contends that article I, section 10 of the Texas Constitution affords greater protection, i.e., a right to counsel at an earlier stage in the proceedings, than does the sixth amendment of the United States Constitution.

We have heretofore rejected this contention in two recent decisions. *Ramirez v. State*, 721 S.W.2d 490 (Tex.App. – Houston [1st Dist.], 1986, no pet.); *Foster v. State*, 713 S.W.2d 789, 790-91 (Tex.App. – Houston [1st Dist.] 1986, no pet.). In both *Foster* and *Ramirez*, we held that article I, section 10 of the Texas Constitution and its statutory progeny (Tex.Code Crim.P.Ann. arts. 1.05, 15.17) (Vernon Supp.1987) gave an accused the right to counsel only upon commencement of formal adversarial judicial proceedings, and that the right to counsel provision of our state constitution does not provide any greater protection in this respect than is afforded by the United States Constitution. The Fort Worth Court of Appeals later issued a similar holding. *Forte v State*, 722 S.W.2d 219 (Tex.App. – Fort Worth, 1986) (on remand): *see also Floyd v. State*, 710 S.W.2d 807 (Tex.App. – Fort Worth 1986, no pet.); *Yates v. State*, 679 S.W.2d 534 (Tex.App. – Tyler 1984, pet. ref'd).

It does not appear that the Court of Criminal Appeals has yet addressed this specific constitutional question. *See Thomas v. State*, 723 S.W.2d 696, 705-706 (Tex.Crim.App. 1986). But, as stated earlier, that court has ruled that the right to counsel under the sixth amendment attaches only upon formal initiation of judicial proceedings.

McCambridge v. State, 712 S.W.2d at 502; *Forte v. State*, 707 S.W.2d 89, 91 (Tex.Crim.App. 1986).

The right to counsel provisions in article I, section 10 (and in Tex. Code Crim.P. art. 1.05) are quite similar in language and purpose to the provisions in the sixth amendment of the United States Constitution. The state provisions refer, as do the sixth amendment provisions, to the rights of an "accused" in a "criminal prosecution." The state provisions are obviously designed to protect the rights of a defendant after formal charges have been initiated, e.g., with the right to a speedy, public trial; the right to be heard by himself or counsel; the right to confront the witnesses against him; and the right to compulsory process to obtain witnesses in his favor. Similarly, the sixth amendment right to counsel exists to protect an "accused" during trial-type confrontations with the State. *See United States v. Gouveia*, 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984).

The appellant argues that the Texas Court of Criminal Appeals in two recent cases, *Dunn v. State*, 696 S.W.2d 561 (Tex.Crim.App.), *cert denied*, ___ U.S. ___, 106 S.Ct. 1478, 89 L.Ed.2d 732 (1986), and *Sanchez v. State*, 707 S.W.2d 575 (Tex.Crim.App. 1986), departed from the federal interpretation of "criminal prosecution" in deciding when a right to counsel attaches under state law, and that the court held in those cases that a citizen's rights under article I, section 10 of the Texas Constitution attach when a suspect is taken into custody. Appellant argues that the right to counsel is logically included in those that attach under article I, section 10. We disagree with appellant's analysis of those decisions.

In *Dunn*, the court held only that the defendant's *fifth* amendment rights were violated when his retained attorneys were not permitted access prior to police interrogation. The court further declared that the defendant's arrest and subsequent questioning did not constitute a "sufficient formalization of proceedings" to trigger the sixth amendment right to counsel. 696 S.W.2d at 565.

In *Sanchez*, the court did hold that the self-incrimination provision of article I, section 10 of the Texas Constitution provided greater protection than the *fifth* amendment of the United States Constitution. *Sanchez v. State*, 707 S.W.2d at 580; *see also Thomas v. State*, 723 S.W.2d at 703-704. But as the State points out, the court in *Sanchez* was concerned only with the protection of a defendant's pretrial silence and not with the right to counsel provisions of the federal and state constitutions.

We find no reason to depart from our holdings in *Foster* and *Ramirez*, and we accordingly overrule the appellant's first and second points of error.

Due Process under the Fourteenth Amendment of the United States Constitution

Due Course of Law under Article I, Section 19 of the Texas Constitution.

In his fifth, sixth, and seventh points of error, appellant contends that he was denied the right to assistance of counsel in violation of the due process and due course of law provisions of the federal and state constitutions, and also under article 1.05 of the Texas Code of Criminal Procedure.

The State correctly points out that appellant's written motion to suppress evidence asserted *other* constitutional and statutory provisions in support of his claim of the denial of right to counsel, and that his motion did not assert either the due process or due course of law provisions as the basis for *that* claim. Thus, the appellant did not preserve these contentions for review. *See Thomas v. State*, 723 S.W.2d 696; *Turner v. State*, 662 S.W.2d 357 (Tex.Crim.App. 1984); Tex.R.App.P. 52. But since these constitutional questions were specifically remanded for our disposition, we proceed to consider them.

The fourteenth amendment of the United States Constitution extends the sixth amendment right to counsel to the states as a matter of due process. *Robles v. State*, 577 S.W.2d 699, 703 (Tex.Crim.App. 1979). The fourteenth Amendment also guarantees certain basic procedural rights, which require that the states respect "certain decencies of civilized conduct" in criminal prosecutions. *Rochin v. California*, 342 U.S. 165, 173 72 S.Ct. 205, 210, 96 L.Ed. 183 (1952); *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 151-152, 82 L.Ed. 288 (1937). Thus, the fourteenth amendment due process clause protects against a criminal conviction being obtained by methods that offend a "sense of justice." *Rochin*, 342 U.S. at 173, 72 S.Ct. at 210.

Some state courts, applying the fourteenth amendment protections to a person suspected of driving while intoxicated, have held that to unreasonably deny a suspect's request for counsel "offends a sense of justice which impairs the fundamental fairness of the proceeding." *See, e.g., Sites v. State*, 300 Md. 702, 481 A.2d 192 (1984); *State v. Newton*, 291 Or. 788, 636 P.2d 393 (1981).

But other state courts have held that a person suspected of driving while intoxicated has no fourteenth amendment due process right to counsel when a breathtest request is made prior to the initiation of formal adversarial proceedings. *See e.g., State v. Armfield*, 693 P.2d 1226 (Mont. 1984); *State v. Braunesreither*, 276 N.W.2d 139 (S.D.1979); *see also Nyflot v. Commissioner of Public Safety*, 369 N.W.2d 512, 516-17 (Minn.), *appeal dismissed*, ___ U.S. ___, 106 S.Ct. 586, 88 L.Ed.2d 567 (1985).

Texas law provides that any person who drives on a public highway is deemed to have given his consent to the taking of a breath or blood-alcohol specimen. Tex.Rev.Civ.Stat.Ann. art. 6701*l*-5 (Vernon Supp. 1987). The language of the statute tends to prevent law enforcement officers from engaging in the type of conduct that could violate due process: it provides that if a person under arrest refuses to give a specimen, none shall be taken. *Id.* at sec. 2(a).

The circumstances set forth in the record before us do not reflect a violation of the basic "decencies of civilized conduct," i.e., those that offend "a sense of justice." Here, there is no indication that appellant was forced to undergo the particular test through the use of physical violence, *McCambridge v. State*, 712 S.W.2d at 504, or through some other means of inappropriate "compulsion." *See Thomas v. State*, 723 S.W.2d 696. We find no basis for holding that appellant was denied due process under the fourteenth amendment.

Neither has the appellant demonstrated a violation of the due course of law provisions of article I, section 19 of the Texas Constitution, or its progeny, article 1.04 of the

Texas Code of Criminal Procedure. The wording of the state due course of law provisions closely correspondes to the language of the fourteenth amendment of the United States Constitution. Although we may not automatically assume that the state protections correspond to the federal ones, *see Thomas v. State*, 723 S.W.2d at 702, we have found no independent historical or policy basis to conclude that the state provisions were intended to offer greater protection than the federal ones. We overrule appellant's fifth, sixth, and seventh points of error.

In his third and fourth points of error (on remand), the appellant contends that he was denied his right to counsel in violation of Tex.Code Crim.P.Ann. arts. 15.17 and 38.22 (Vernon Supp. 1987). On original submission, the appellant argued in his brief that he was entitled to assistance of counsel under the provisions of Tex.Code Crim.P. 15.17. But as the State correctly points out in its reply brief on remand, appellant's motion to suppress did not list that statutory provision specifically in support of his right to counsel claim. Nor did the appellant's motion to suppress refer to the provisions of article 38.22 in support of his right to counsel claim, and appellant's brief on original submission made no reference to that statute. Appellant made no right to counsel claims in the trial court based on the provisions of sections 15.17 and 38.22, and the trial court, therefore, was not given an opportunity to rule on those contentions. On this appeal, the appellant has not shown any cause, justification, or excuse for his failure to raise such contentions in the trial court. Because of this unexplained procedural default, we decline to review these claims here. *See Perry v. State*, 703 S.W.2d 668 (Tex.Crim.App. 1986); Tex.R.App.P. 52(a).

The judgment of the trial court is affirmed.

APPENDIX D

DENNIS MICHAEL McCAMBRIDGE, Appellant

NO. 297-87 v. - - - - - -

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the First Court of Appeals [HARRIS County]

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

The appellant was convicted of driving while intoxicated. Granting his first petition for discretionary review in *McCambridge v. State*, 712 S.W.2d 499 (Tex.Cr.App. 1986), we affirmed the judgment of the First Court of Appeals holding *inter alia*, that under the Sixth Amendment to the United States Constitution the "[a]ppellant's right to counsel did not attach until the complaint and information were filed." *Id.*, at 502. Consequently, under the Sixth Amendment, the appellant was not entitled to consult with an attorney prior to taking the breath test.

This Court, observing that the court of appeals failed to address the appellant's other constitutionally predicated claims for relief, remanded the case to the court of appeals. The appellant's contentions that the court of appeals was to review upon remand were as follows: that the appellant had a right to consult with an attorney before providing police with a breath sample for an intoxilyzer test under the right to counsel provision of Art. I, §10 of the Texas Constitution; that he also had a right to counsel under the due process clause of the Fourteenth Amendment to the United States constitution, and under the due course of law provision of Art. I, §19 of the Texas Constitution. In its opinion following the remand, the

court of appeals rejected the appellant's contentions. *McCambridge v. State*, 725 S.W.2d 418 (Tex. App. – Houston [14th] 1987).

Relative to the appellant's contention that he was entitled to counsel prior to the breath test under Art. I, §10 of the Texas Constitution and Art. 1.05, V.A.C.C.P., the court of appeals stated: "the right to counsel provision of our state constitution does not provide any greater protection in this respect than is afforded by the United State constitution." *McCambridge v. State*, supra, at 420. Thus, one's right to counsel under Art. I, §10 of the Texas Constitution "attaches only upon formal initiation of judicial proceedings." *Id.*, at 420.

Apparently after this Court remanded this cause to the court of appeals, the appellant, for the first time, claimed that he was denied his right to counsel in violation of Articles 15.17 and 38.22, V.A.C.C.P. The court of appeals summarily disposed of these issues by declining to review the claims because of appellant's unexplained procedural default.

Finally, the Court overruled appellant's grounds of error dealing with being denied due process and due course of law under the provisions of the Federal and State Constitutions, and also under Article 1.04 of the Texas Code of Criminal Procedure. Finding that the due course of law provisions of the Texas Constitution and its statutory progeny provide no greater protection than that of its federal equivalent, the Court held that denial of counsel before deciding whether to submit to a breath test under the circumstances of this case did not reflect a violation of the basic "decencies of civilized conduct," *id.*,

at 421-422, and therefore there was no basis to conclude that appellant was denied either due process or due course of law under the respective constitutions.

This Court granted appellant's petition for discretionary review in order to determine the correctness of the court of appeals opinion relative to the following grounds for review:

> 1. Whether the court of appeals erred in determining that appellant's breath test result was obtained in violation of the right to counsel provision of Article 1, §10 of the Texas Constitution.
>
> 2. Whether the appellant had a right to counsel under Articles 1.05, 15.17, and 38.22 of the Texas Code of Criminal procedure.
>
> 3. And, whether the court of appeals erred in determining that the due process and due course of law provisions of the Federal and State Constitutions respectively, as well as Article 1.04 of the Texas Code of Criminal Procedure did not require the assistance of counsel before appellant made a decision as to whether he should take the breath test.

We will affirm the judgment of the court of appeals. In *Forte v. State*, 759 S.W.2d 128 (Tex.Cr.App. 1988), this Court held "[t]he time at which an accused is faced with decision of whether to submit to a breath test is not a 'critical stage' of the criminal process which necessitates either the prior consultation or presence of counsel under the right to counsel provision of Article I, §10 of the Texas Constitution." *Id.*, at slip op. p. 23-24. We therefore reject the appellant's claim made pursuant to Article I, §10 of the Texas Constitution.

We also find that his assertions made under Articles 1.05, 15.17 and 38.22 of the Texas Code of Criminal Procedure, are likewise without merit. Rather than invoke the waiver doctrine, we will resolve these collateral issues as a matter of judicial economy. As to Article 1.05,[1] *supra*, it is obvious that it is merely the codified statutory progeny of Article I, §10 of the Texas Constitution and we can find no authority which would indictate that the Legislature intended an expansion of rights other than those set out in the constitutional provision.

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[1] Article 1.05, *supra*, reads as follows:

> In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and have a copy thereof. He shall not be compelled to give evidence against himself. He shall have the right of being heard by himself, or counsel, or both; shall be confronted with witness against him, and shall have compulsory process for obtaining witnesses in his favor. No person shall be held to answer for a felony unless on indictment of a grand jury.

The pertinent portion of Article 15.17, *supra*, states:

> (a) In each case enumerated in this Code, the person making the arrest shall without unnecessary delay take the person arrested or have him taken before some magistrate of the county where the accused was arrested or, if necessary to provide more expeditiously to the person arrested the warnings described by this article, before a magistrate in a county bordering the county in which the arrest

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Nor can we glean from Article 38.22, *supra*, a Legislative intent that would statutorily provide a right to counsel prior to the administration of the chemical sobriety

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was made. The magistrate shall inform in clear language the person arrested of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, of his right to request the appointment of counsel if he is indigent and cannot afford counsel, and of his right to have an examining trial. He shall also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall admit the person arrested to bail if allowed by law.

The applicable portion of Article 38.22(2)(a), *supra*, reads:

(a) the accused, prior to making the statement, either received from a magistrate the warnings provided in Article 15.17 of this code or received from the person to whom the statement is made a warning that:

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;

(2) any statement he makes may be used as evidence against him in court;

(Continued on following page)

test. Just recently in *Bass v. State*, 723 S.W.2d 687 (Tex.Cr.App. 1986), this Court held "[b]ecause '[i]n the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of [the Fifth Amendment],' *McCambridge v. State*, 712 S.W.2d 499 (Tex.Cr.App. 1986), quoting *South Dakota v. Neville*, 459 U.S. at 564, n. 15, 103 S.Ct. at 923, n. 15, we do not think such inquiry constitutes an 'interrogation' for purposes of Article 38.22, supra." *Id.*, at 691. This reasoning is equally applicable to appellant's claim asserted under Article 15.17, *supra*, as the warnings made mandatory in that provision are but part of the predicate set forth in Article 38.22(2)(a), *supra*, which is necessary for the introduction of a written statement of an accused. Further, there is nothing in the record to suggest that a magistrate prevented the appellant from contacting counsel. Therefore, the appellant's claims grounded upon the various statutory right to counsel provisions are therefore denied.

In three grounds for review the appellant claims that the due process clause of the Fourteenth Amendment and independently Art. I, §19 of the Texas Constitution (due course of law) and its statutory equivalent, Article 1.04,

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(3) he has the right to have a lawyer present to advise him prior to and during any questioning;

(4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has the right to terminate the interview at any time; and

* * *

V.A.C.C.P., create a "limited right to counsel to guarantee fairness . . . " to the appellant. In other words, the appellant claims that the due process clause of the Federal Constitution and its state counterpart (due course of law provision in Art. I, §19, *Tex.Const.*) are either jointly or independently the basis of a right to counsel under the Sixth Amendment of the United States Constitution or Art. I, §10 of the Texas Constitution.

Relative to the appellant's Fourteenth Amendment due process claim, in *Powell v. Alabama*,[2] 287 U.S. 45 (1932), the United States Supreme Court did ignore the Sixth Amendment's right to counsel provision and instead concluded that the due process clause of the Fourteenth Amendment required the states to provide counsel to a defendant exposed to the death penalty. The philosophical basis for the Court's decision was essentially that fundamental fairness demanded the appointment of counsel because without counsel the defendant would be deprived of a fair trial.

The practical basis of the Court's utilization of the due process clause in its decision was not nearly so esoteric: in 1932, the Supreme Court had not yet begun to selectively apply the Bill of Rights to the states. Consequently, the fundamental fairness analysis was the prevailing analysis.

Nevertheless, through *Powell* and several cases decided after *Powell: Johnson v. Zerbst*, 304 U.S. 458 (1938), *Betts v. Brady*, 316 U.S. 455 (1942), the Court made it clear

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[2] See *Forte v. State*, supra, n. 17, slip op. p. 20 for a more thorough discussion of *Powell v. Alabama*, supra.

that a constitutional right to counsel could be derived from both the due process clause of the Fourteenth Amendment and the Sixth Amendment. However, in 1963 that, insofar as criminal prosecutions are concerned, changed. In *Gideon v. Wainright*, 372 U.S. 335 (1963), the United States Supreme Court concluded that the Sixth Amendment was applicable to the states through the Fourteenth Amendment. Thus, at least in this context, it became unnecessary to employ the due process clause and a fundamental fairness analysis to determine if a state is obligated to provide counsel to an indigent defendant.

That, however, did not automatically eliminate the principle that due process is an independent source for a right to counsel. For example, in *Golberg v. Kelly*, 397 U.S. 266 (1970), the Supreme Court concluded that because of the due process clause welfare recipients could not have their benefits terminated without an evidently hearing. In addition, the Court, citing *Powell v. Alabama*, supra, decided that the welfare recipient had a right to be represented by counsel at such evidentiary hearing. At the Foundation of *Golberg v. Kelly*, supra, was the observation that " '[t]he fundamental requisite of due process of law is the opportunity to be heard.' " *Id.*, at 267. So, the Court's deriving a right to counsel guarantee from the due process clause was done simply to insure that "[t]he fundamental requisite of due process of law . . . ," *id.*, a fair hearing, was achieved.

Later, in *In Re Gault*, 387 U.S. 1 (1967), the Supreme Court held that due process imposes an obligation on the states to provide appointed counsel for indigent defendant's in all juvenile delinquency proceedings "which

may result in commitment to an institution in which the juvenile's freedom is impaired." *Id.*, at 41.

Similarly, in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the Supreme Court concluded that due process required a state to provide appointed counsel in parole or probation revocation proceedings where the facts of a particular case are such that the appointment of counsel is necessary to ensure the fairness of the hearing.

The Supreme Court has also utilized the due process clause of the Fourteenth Amendment to compel the states to provide to indigent defendants not only counsel on appeal, *Douglas v. California*, 372 U.S. 353 (1963), but effective counsel on appeal. *Evitts v. Lucy*, 469 U.S. 387 (1985).

The Supreme Court has not yet expressly reconciled the constitutional duality of the right to counsel guarantees as expressly provided in the Sixth Amendment and implicitly provided in the Fourteenth Amendment to guarantee a fair hearing, as initially recognized in *Powell v. Alabama*, supra. Despite their often combining, and therefore confusing, the two principles (see: *Cuyler v. Sullivan*, 446 U.S. 335 (1980)), it appears that at least since *Gideon v. Wainright*, supra, and due process guarantee of counsel has been restricted to civil proceedings (*Golberg v. Kelly*, supra), quasi-civil proceedings (*Gagnon v. Scarpelli*, supra; *In Re Gault*, supra), or appeals (*Douglas v. California*, supra). The Sixth Amendment's guarantee of counsel on the other hand has been restricted to proceedings that are identified in the Sixth Amendment – "criminal prosecutions." See: LaFave & Israel, *Criminal Procedure* §11.01 (West Publishing Co.: St. Paul, Minn., 1984).

A driving while intoxicated prosecution is unquestionably a "criminal prosecution;" therefore, based upon the foregoing analysis, there is no due process right to counsel guaranteed by the Fourteenth Amendment. One's right to counsel in a DWI prosecution is guaranteed by the Sixth Amendment.

The appellant relies principally upon *Sites v. State*, 481 A.2d 192 (Md. 1984) to support his due process claim. In *Sites* the Maryland Court of Appeals concluded that their implied consent statute did not statutorily grant to one a right to counsel. Furthermore, the court concluded that since the decision to take a breath test was not a critical stage of the criminal process there was no Sixth Amendment right to counsel. Conversely, however, the court concluded that the due process clause of the Fourteenth Amendment and their state constitution's due process clause provided a DWI suspect with a limited right to counsel.

Ignoring the "critical stage" analysis, applicable to claims of right to counsel under the Sixth Amendment, the Maryland Court concluded that because of the mandatory driver's license suspension, statutorily required of one who refuses the breath test, access to counsel is a constitutional imperative.

We reject the Maryland Court's analysis and its conclusion for a number of reasons. First, the court concludes that the Fourteenth Amendment is an independent source for a right to counsel and cites principally *Golberg v. Kelly*, supra. However, as we previously noted, *Golberg v. Kelly*, supra, followed *Gideon v. Wainright*, supra, and the latter's selective application of the Sixth Amendment to the

states. Further, it is a civil proceeding. The other cases cited by the Maryland Court are similarly distinguishable.

Second, the court does not explain how deciding to take the breath test is not a critical stage of the criminal process and is yet a decision that offends fundamental fairness if made without the assistance of counsel. Thus, the opinion contains an internal contradiction.

Even if we were to conclude that the Fourteenth Amendment was an independent source of one's right to counsel it would still be necessary to distinguish a time in the criminal process that the right would become effective. In Sixth Amendment cases that has been identified as the "critical stage" and is normally after a criminal complaint is filed. *United States v. Wade*, 388 U. S. 218 (1967), *Forte v. State*, supra. Consistency would therefore demand that the same critical stage analysis be applicable to a right to counsel under the Fourteenth Amendment. If we were to hold otherwise we would be engaging in the same erroneous analysis as the Maryland Court of Appeals: the determination whether to submit to a breath test demands the assistance of counsel if fundamental fairness is to be achieved, but such decision is not a critical stage of the investigative process. With due respect to the Maryland Court of Appeals, such a conclusion is illogical.

Therefore, we conclude that in the context of this proceeding the appellant did not have a right to counsel under the Fourteenth Amendment.

Relative to this "critical stage" analysis, in *Forte v. State*, supra, we agreed with the Oregon Supreme Court

in *State v. Spencer*, 750 P.2d 147 (Or. 1988), that the United States Supreme Court's critical stage designation as being dependent upon the initiation of adversary criminal proceedings, as set forth in *Kirby v. Illinois*, 406 S.W.2d 682 (1972), was flawed, because it constituted a contrived departure from the standards established in *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967). Or, "[t]he line drawn by the [Supreme] Court in *Kirby* seems to be nothing but a 'mere formalism.' " Miller, "Right to Counsel: State Courts on the Front Line," *Annual Survey of American Law*, p. 179 (1984).

Having rejected as artificial the determination that a critical stage in the process occurs only after the filing of a complaint, we instead decided that the "critical stage" in the criminal process should be determined on a case by case basis and "must be judged on whether the pretrial confrontation presented necessitates counsels' presence as to protect a known right or safeguard." *Forte v. State*, supra, at 183.

Since making that determination, however, we have concluded that the classification of a period in the criminal process as "critical" on a case by case basis is ambiguous, vague, and thus unworkable. Consistency is the objective of any legal standard. If consistency can be achieved it benefits both law enforcement and the public. Consequently, although we do not depart from our conclusion that the reasoning in *Kirby* cannot be logically reconciled with the converse reasoning in *Wade* and *Gilbert*, we are nonetheless persuaded that by adopting a bright line rule establishing when the critical stage in the criminal process occurs the public will ultimately benefit.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Supreme Court, giving substance to what it said in *Miranda v. Arizona*, 384 U.S. 436 (1966), held that an accused person in custody who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, supra, at 484-485. Three years later the Supreme Court emphasized the decisive nature of their holding in *Edwards*, by declaring that "Edwards established a bright line rule to safeguard pre-existing rights." *Solem v. Stumes*, 465 U.S. 638 (1984).

The intent of the Supreme Court in *Edwards* was to create a conclusive rule that would be immune form the vagaries that invariably accompany diverse factual encounters. By establishing a hard and fast rule in *Edwards*, the Court was striving to not only insure a suspect's Fifth Amendment rights, but also give to law enforcement authorities a distinct and definable boundary beyond which they cannot legitimately venture.

In *Michigan v. Jackson*, 475 U.S. 625 (1986), again emphasizing the bright line nature of the *Edwards* holding, the Court extended *Edwards* to violations of one's right to counsel under the Sixth Amendment. In doing so, the Court confirmed that a suspect's right to counsel under the Sixth Amendment does not arise until the criminal process has progressed to a "critical stage." Citing *United States v. Gouveia*, 467 U.S. 180 (1984), the Court noted that a "critical stage" emerges only after the initiation of adversary proceedings. In reaching its decision,

the Court again emphasized the " 'bright line' quality . . . ," *Michigan v. Jackson*, supra, at 634, of the *Edwards* decision.

More recently, in *Arizona v. Roberson*, ___ U.S. ___, 108 S.Ct. 2093 (1988), the Supreme court was requested "to craft an exception to that rule for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation." *Id.*, at 2096. The Court refused to create such an exception and as they did in *Michigan v. Jackson*, supra, stressed the "virtues of a bright line rule. . . ." *Arizona v. Roberson*, supra, at 2098. The Court observed that *Edward's* bright line rule, as a relatively rigid requirement, "has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Id.*, at 2098.

Establishing a bright line rule relative to when a "critical stage" of the criminal process arises under art. I, §10 of the Texas Constitution will have similar beneficial consequences. Further, the creation of a bright line rule results in predictability. In addition, judicial review can be more precise, but, most important, it gives law enforcement authorities the parameters within which they can legally operate. At the present time law enforcement has to speculate whether a stage in the process is critical so as to compel the necessity of counsel. Speculation about one's legal right is a burden law enforcement should not have to carry.

Therefore, we now hold in the context of this case that under Art. I, §10 of the Texas Constitution, a critical stage in the criminal process does not occur until formal charges are brought against a suspect. The language in *Forte v. State*, supra, to the contrary is overruled.

Relative to the appellant's remaining grounds for review, we also conclude that Art. I, §19 (due course of law) and Art. 1.05, V.A.C.C.P., do not confer a right to counsel independent of that guaranteed by Art. I, §10 of the Texas Constitution. There is absolutely no reason to engraft upon either Art. I, §19 or Art. 1.05, V.A.C.C.P., a substantive right to counsel when that same right is expressly provided in Art. I, §10 of the Texas Constitution.

Accordingly, the judgment of the court of appeals is affirmed.

DUNCAN, III, Judge

(Delivered September 13, 1989)
EN BANC
PUBLISH

Clinton, J., disagreeing that "consistency" demands a "critical stage analysis" to assistance of counsel under due process and due course of law, respectfully dissents.

DENNIS MICHAEL MCCAMBRIDGE, Appellant		PETITION FOR DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS
NO. 297-87	vs.	
THE STATE OF TEXAS, Appellee		[Harris County]

DISSENTING OPINION

Today, this Court is given the opportunity to give true meaning to the provisions of Art. I, §10, of the Texas Constitution. Because it does nothing less than adopt in principle what the present archconservative Supreme Court's majority has already written and held, in its construction of the federal constitution, I respectfully dissent.

Over thirty years ago, Justice Douglas of the United States Supreme Court, when that Court was a conservative court, opined in the dissenting opinion that he filed in *Crooker v. California*, 357 U.S. 433, 78 S.Ct. 1287, 1296 (1958): "The demands of our civilization expressed in the Due Process Clause [of the Fourteenth Amendment] require that *the accused who wants a counsel should have one at any time after the moment of arrest.*"

I firmly believe that a majority of the citizens of Texas, if given the opportunity, would vote for what Justice Douglas stated. Today, however, a lackluster majority of this Court *declines* to hold that under Art. I, §10, of the Texas Constitution, the "Rights of the Accused in Criminal Prosecutions" clause,[1] an individual lawfully

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[1] In pertinent part, Art. I, § 10, supra, provides that the accused "shall have the right of being heard by himself or counsel, or both."

arrested for allegedly committing the offense of driving while intoxicated has the right to the assistance of counsel from that point forward; they opt instead to hold that such a person has the right to the assistance of counsel *only* after formal criminal charges have been filed, which act apparently lies in the discretion of the police as to just when that must occur.

I believe that this Court has the duty to protect the rights of the citizens of this State. Also see the dissenting opinions that I filed in *McCambridge v. State*, 712 S.W.2d 499, 507 (Tex.Cr.App. 1986); *Bass v. State*, 723 S.W.2d 687, 692 (Tex.Cr.App. 1986); *Thomas v. State*, 723 S.W.2d 696, 716 (Tex.Cr.App. 1986); *McGinty v. State*, 723 S.W.2d 719, 722 (Tex.Cr.App.1986). Today, however, a majority of this Court fails to perform that legal duty that all of its members, either expressly or implicitly, agreed to perform when they took office.

I confess: I subscribe to the viewpoint that, no matter what criminal offense the accused is arrested by the police for allegedly committing, and no matter what kind of incriminating evidence the police thereafter seek from him, he is entitled to be first warned by the arresting officer of all known criminal legal rights that he might have, which, of course, includes the right to have the assistance of counsel from the point of arrest, and if he does not affirmatively and unequivocally waive all of his known legal rights, any and all incriminating evidence, no matter the form such might come in, that was seized or obtained from him by the police, should be suppressed at his trial, if such trial occurs. I believe that this stage of the criminal process is part of the "criminal prosecution." See Art. I, § 10, *Texas Constitution*.

Given what the majority opinion states and holds, I ask: Does a person who has been lawfully arrested by the police for allegedly committing the offense of driving while intoxicated have any federal or state criminal legal rights prior to being formally charged by the police? No where in the majority opinion in this cause, the majority opinion in *Forte v. State*, -S.W.2d- (Tex.Cr.App.No. No. 118-87, September 27, 1988), and the majority opinions in the above cited cases of this Court are we told what legal rights, if any, such as individual has. If they exist, the majority opinion should tell us what they are. Of course, if no legal rights exist, the majority opinion should state in big, bold print that an individual who has been lawfully arrested for driving while intoxicated, and formal charges have not yet been filed, has no criminal legal rights at that stage of the process, such as the right to have the assistance of counsel, and that our men in blue, where all they seek from such a defendant is for him to act or perform on video, much like a mime might do, or submit a blood, breath, urine, or some other bodily substance specimen, should not give the *Miranda* warnings to those defendants, because all that the giving of such warnings do is cause confusion, both in the field, at the station house, and in both trial and appellate courtrooms.

What frightens me about the above majority opinions, and the one in this cause, is that much of what has been written can be read out of the context that the offense in all of these causes is driving while intoxicated. for unknown reasons, a person lawfully arrested in Texas for driving while intoxicated is to be treated differently from a person who has been lawfully arrested for committing some other criminal wrong.

Why isn't the stage of the criminal process where the individual has been lawfully arrested but not yet formally charged for allegedly driving while intoxicated not a part of the "criminal prosecution?" See Art. I, § 10, of the Texas Constitution. Why isn't such an accused person entitled to receive the benefit of at least the criminal legal rights set out in that section of the Constitution, unless he affirmatively waives those rights? The majority implicitly, if not expressly, holds that such an individual has no criminal legal rights until formal criminal charges have been filed by the police. Although it is the rare case where the police might use physical violence on the accused, see and compare, however, *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), he is certainly subject to all sorts of mental pressure by merely being in the physical custody of the police. He certainly needs at least the guiding hand of counsel when he finds himself in that situation.

The term "criminal prosecution" is not defined in our Penal Code, in the Code of Criminal Procedure, or in the Texas Constitution. However, the Supreme Court of Texas in *Farris v. Tipps*, 463 S.W.2d 176 (Tex. 1971), held that a revocation of probation proceeding is a "criminal prosecution" within the meaning of Art. I, § 10, of the Texas Constitution, and that such a defendant has the criminal legal right to a speedy hearing on the State's motion to revoke. In construing Art. 24 of the former Penal Code, which provided: "A 'criminal action' means the whole of any part of the procedure which the law provides for bringing offenders to justice; and the terms 'prosecution' and 'accusation' are used in the same sense", Chief Justice Calvert, in writing for the Court, concluded: "By this provision a 'criminal prosecution' expressly includes a

proceeding in which probation may be revoked and sentence imposed." (178-179). Art. 24 was previously Art. 26 of the 1911 Penal Code, which read: "A 'criminal action.' as used in this Code, means the whole and any part of the procedure which the law provides for bringing offenders to justice; and the terms 'prosecution,' 'criminal prosecution,' 'accusation,' and 'criminal accusation,' are used in the general sense." Also see *Bautsch v. City of Galveston*, 11 S.W. 414 (Ct.App.1889). Thus, there is authority for holding that an accused individual, who has been lawfully arrested for allegedly committing a criminal wrong, and who has not been formally charged for that offense, is entitled to all the criminal legal rights provided in Art. I, § 10, of the Texas Constitution, because that stage of the process is part of the procedure which the law provides for bringing offenders to justice.

Perhaps what causes the majority unwilling to construe Art. I, § 10, supra, to mean that an individual who has been lawfully arrested for driving while intoxicated is entitled to have the criminal legal right to the assistance of counsel lies in the fact that this Court "has not yet staked out a Texas constitutional protection any more solicitous than that required by the federal constitution." Harrington, *The Texas Bill of Rights: A Commentary and Litigation Manual* (Butterworth, 1987), at page 161. In short, in recent times, it was not this Court that first ruled that an individual who had been lawfully arrested had certain criminal legal rights at that stage of the criminal process. It was a moderate Supreme Court of the United States that gave us most pre-trial constitutional rights that now exist. Of course, because that Court gave meaning to those rights, when its membership changes, a

majority of that Court is free to vote to diminish or destroy those criminal legal rights that a more enlightened majority had previously given birth to.

Because the Supreme Court of the United States in recent times withdrew from its role as champion of individual rights, see *Brown v. State*, 657 S.W.2d 797, 808 (Tex.Cr.App.1983) (Teague, J., dissenting), it is now necessary, where this Court desires to see that individual rights are protected more under the Texas Constitution and Texas statutory laws than under the Federal Constitution, for it to "discern the meaning of constitutional protection in Texas and apply it with the same courage which our predecessors showed in risking, and sometimes giving their lives for the promise of liberty." Harrington, supra, at page 2. Where an appellate court chooses to write on a new slate, this is labeled in some quarters as "The New Federalism." See, for example, Harrington, supra; Duncan, "Terminating The Guardianship: A New Role for State Court", 19 *St. Mary's Law Journal* (1988); Bamberger, Chairperson, *Recent Developments in State Constitutional Law* (Practicing Law Institute, 1985); "Civil Liberties Under the Texas constitution", *A Seminar Sponsored by the San Antonio Bar Association and the American Civil Liberties Union*, 1987; Linde, "First Things First: Rediscovering The States' Bill of Rights," 9 *U.Balt.L.Rev.* 379 (1980); Hingson, *How to Defend a Drunken Driving Case* (Clark Boardman, 1987).

In this instance, the majority opinion holds: "[W]e conclude that in the context of this proceeding the appellant did not have a right to counsel beyond that provided by the Sixth Amendment", which holding I find is consistent in principle with what the present archconservative Supreme Court of the United States has already stated.

See *Pennsylvania v. Bruder*, -U.S.-, -S.Ct.-, -L.Ed.2d- (October 31, 1988), which implicitly, if not expressly, overruled *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), which held that the police are required to give the defendant, who has been arrested for allegedly committing a misdemeanor traffic offense, such as when the defendant has been arrested by the police for allegedly committing the offense of driving while intoxicated, the "Miranda" warnings.

In this Court's most recent *Forte*, supra, opinion, it was held that in a driving while intoxicated case, "It is not the point of arrest which triggers the Art. I, Sec. 10 [Texas Constitution] right to counsel but rather *whether an individual is confronted with the amassed power of the State in such a manner that it is deemed necessary that counsel's presence is required to 'preserve the basic right to a fair trial* . . . ." (My emphasis.) If such statement is not meant to be limited or restricted to the courtroom stage of the process, then I assume that in make the determination whether the accused is entitled to have the assistance of counsel at the "breathalyzer" stage of the process, we must look at the facts of the particular case.

The facts of this cause that relate to police conduct at the "breathalyzer" stage of the process, which does not then implicate or concern the "courtroom" stage of the process, fit the above quote to a T.[2] And yet,

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[2] I dare say that, if one relayed to another person the following facts, and asked him did they occur in the State of Texas, or did they occur in some third world country, the other person would immediately respond: "Not in the State of Texas!" But dear reader, he would be dead wrong, because the following facts did occur in good ole Texas, U.S.A., and not in some third world country.

notwithstanding the egregious police facts that are present in this record, a majority of this Court holds that appellant was not entitled to have the assistance of counsel. I am compelled to ask: Given the horrible police facts of this cause, if appellant was not entitled to have the assistance of counsel at the "breathalyzer" stage of the process in this cause, then when, if ever, will any individual who has been lawfully arrested and accused by the police of allegedly driving while intoxicated, who has not been formally charged, be entitled to have the assistance of counsel at that stage of the process if all that the police want him to do is perform on video and submit a breath or blood specimen?

For reasons not in the record, the police failed to comply with Art. 14.06, V.A.C.C.P., which prescribes the following: "In each case enumerated in this Code, the person making the arrest shall take the person arrested or have him taken without unnecessary delay before the magistrate who may have ordered the arrest or before some magistrate of the county where the arrest was made without an order. The magistrate shall immediately perform the duties described in Article 15.17 of this Code" Article 15.17, V.A.C.C.P., expressly provides, inter alia, that the accused person shall be warned by the magistrate that he has the right to have the assistance of counsel.[3] The failure by the police to comply with the terms of Art.

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[3] There is no dispute that appellant was arrested by the police for driving while intoxicated. Art. 15.22, V.A.C.C.P., provides: "*A person is arrested* when he has been actually placed under restraint or taken into custody by an officer or person executing a warrant of arrest, or by an officer or person arresting without a warrant." (My emphasis.)

14.06, supra, in this cause can perhaps be explained by the fact that this Court has never seen fit to enforce the provisions of Art. 14.06, supra. See, however, the dissenting opinion that I filed in *Williams v. State*, 692 S.W.2d 671, 680 (Tex.Cr.App.1984), which suggested that this Court should commencing seeing that that statute, whose validity has not to my knowledge ever been challenged, was enforced in Texas.

After the police arrested appellant, they "Mirandized" him, warning him, inter alia, that he then had the right to have the assistance of counsel, after which appellant affirmatively made known to the arresting officers that he wanted the assistance of counsel at that stage of the process. Of course, at that point in time it would have been virtually impossible for the police to have afforded him the assistance of counsel. Thus, it is understandable why the police told him that that he could not have counsel at that time but that he could receive the assistance of counsel when he got downtown at the station house. Thereafter, while appellant was in the videotaping room of the station house, where he was continuously harassed by the police to take the breathalyzer test, *on at least nine separate occasions* he requested the assistance of counsel, which requests were ignored by the police.

After appellant made his tenth request for the assistance of counsel, the police removed him from the videotaping room, after which, apparently while standing in a hallway, police officers continued to harass him by exerting mental pressure on him to get him to take the breath test. *Eight more times appellant refused to submit to the test.* Finally, much like a prisoner of war in a third world country might have done, *after he had made his eighteenth*

request of the police for the assistance of counsel, with each request being denied by the police, appellant discontinued requesting the assistance of counsel and finally took the intoxilizer test, which test the record makes clear he did not want to take until after he had consulted with an attorney. At his trial, over objection, the trial judge admitted into evidence the result of the breath test, which, because appellant failed the test, was highly damaging to his case.

The above facts are obviously not shocking to a majority of this Court, although they are certainly shocking to me, and I believe that they will easily shock the conscience of the average citizen of this State who becomes aware of them. However, see and compare the facts that are set out in *Collins v. State*, 352 S.W.2d 841 (Tex.Cr.App.1962), which did not shock the conscience of this Court but were so shocking to the conscience of the Fifth Circuit that it granted the defendant relief, see *Collins v. Beto*, 348 F.2d 823 (5th Cir.1965).[4] But compare *Dunn v. State*, 696 S.W.2d 561 (Tex.Cr.App.1985), where an

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[4] Of course, there are a few individuals, such as Professor Inbau of Northwestern University, who teach and preach that an attorney's presence at the stationhouse can cause undue confusion and interference with good police work, and that no accused person in that situation should be permitted to have the assistance of counsel at that stage of the criminal process. See, for example, Inbau, "Over-Reaction – The Mischief of Miranda v. Arizona," *The Prosecutor*, Vol. 18, No. 4. I find that Professor Inbau's views, and those who subscribe to his views, are as impressive as the number of wins that Northwestern University's football team has had since Otto Graham played quarterback at that school almost 50 years ago.

enlightened majority of this Court that was led by Judge Campbell went to extreme lengths in another egregious police factual situation to guarantee the defendant in that cause, who had been arrested and was then in the custody of the police for murdering his father, the right to have the assistance of counsel at that point in time, notwithstanding the fact that the defendant did not even know the attorneys who were trying to make contact with him, or that they were even attempting to contact him. However, given what the majority of this Court has been holding in recent times in this area of the law, and in particular given what it holds in this cause, *Dunn*, supra, may now be an aberration in our law when it comes to an accused person having the right to have the assistance of counsel during the pretrial or pre-formal charge stage of the process.

When this cause was previously before this Court, this Court ruled that (1) there was no denial of appellant's *Sixth Amendment* right to counsel when he was requested to submit to a breath test, because formal adversary proceedings had not been initiated against him at that time, and (2) the police did not violate appellant's *Fifth Amendment* rights under decisions of the Supreme Court of the United States by continuing to ask him whether he would willingly take the breath test, because this did not amount to custodial interrogation. This Court ordered the cause remanded to the court of appeals for that court to make the determination whether the right to counsel provision under Art. 1, § 10, of the Texas Constitution and the Due Process Clause of the Fourteenth

Amendment to the Federal Constitution had been violated. See *Mc Cambridge v. State*, 712 S.W.2d 499 (Tex.Cr.App. 1986).

For reasons that I expressed in the dissenting opinion that I filed in this Court's majority *Mc Cambridge* opinion, I believed then, and still do, that unless this Court intended to invoke "The New Federalism", see *ante*, remanding this cause to the court of appeals was performing a useless task, especially given what this Court's majority had already stated in its opinion of *Forte v. State*, 707 S.W.2d 89 (Tex.Cr.App. 1986), which is this Court's first *Forte* opinion, Furthermore, given what this Court has previously stated on the subject, and what the court of appeals stated in this cause on remand, one must wonder why, given what the majority writes, a majority of this Court needlessly spends additional time on this cause.

I pause to point out that the respective and competing views on whether the accused in a driving while intoxicated case has the right to the assistance of counsel, after his arrest and prior to formal criminal charges being filed, are probably best reflected by this Court's majority opinion in its latest *Forte*, supra, opinion and what the Fort Worth Court of Appeals stated in its original and well reasoned opinion by Justice Ashworth of *Forte v. State*, 686 S.W.2d 744 (Tex.App.-2d Dist. 1985). In speaking for that Court, Justice Ashworth pointed out that where the accused has been arrested by the police and placed in their custody for allegedly committing the offense of driving while intoxicated, even though formal criminal charges had not then been filed, that this is a critical stage of the process, and thus such an individual

is entitled to have the assistance of counsel at that stage of the process.

> In determining whether the stage prior to the blood-alcohol test is critical, we briefly review the situation. The accused has been taken into custody; he has been informed that he has the right to remain silent and has the right to consult an attorney, and he has been informed that his operator's license can be suspended if he refuses to give a speciment of his breath or blood. He is placed on the horns of a dilemma – he has been told he may remain silent and consult an attorney, and in the same breath is required to answer a question which has significant results. If he refuses, he knows his license may be suspended and the fact that he refused can be used as evidence against him in his trial. If he consents and the test reveals an alcohol content in his blood of 0.10% or more, he is automatically guilty of driving while intoxicated. Even if the test results show less than 0.10% concentration of alcohol, there is no guarantee that he will not be tried for the offense of public intoxication, or driving while intoxicated by reason of the fact that his mental or physical faculties were impaired. It stretches reason to say this is not a critical stage of the pretrial proceeding . . . We therefore find . . . that a person has a right to counsel prior to making a decision regarding whether to submit to the chemical test referred to in arts. 6701L-1 and 5. (753-754).[5] (Footnote added.)

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[5] Also see the well reasoned dissenting opinion that Judge Knoll of Louisiana's Third Court of Appeals filed in *State v. Broussard*, 517 So.2d 1000, 1004 (La.App.3 Cir. 1987). Also see

(Continued on following page)

In the dissenting opinion that I filed in this Court's first *Mc Cambridge v. State*, 712 S.W.2d 499, 508 (Tex.Cr.App. 1986), cause, I pointed out that a clear reading of the Fort Worth Court of Appeals opinion of *Forte*, supra, easily showed why its decision was not predicated upon either Federal or State constitutional grounds but instead was based upon State statutory grounds. The majority opinion of this Court, however, erroneously in my view, construed the court of appeals opinion to mean that it was doing nothing more than refusing to adhere to what the Supreme Court of the United States has already stated and held in this area of the criminal law, and remanded the cause to that court, "for consideration of whether appellant was denied the right to counsel under Texas law." 707 S.W.2d at 96.

In this Court's majority opinion of *Forte v. State*, -S.W.2d- (Tex.Cr.App.No. 118-87, September 27, 1988), the following was stated: "Thus, in Texas by operating a motor vehicle upon the public highway consent is legally implied. It would defy both logic and common sense, then to authorize a driver to invoke that implied consent, and ultimately suspend the driver's license for exercising the right of refusal. In actuality, *since the suspect has no legal choice [and thus no independent decision to make]*

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Arizona v. Juarez, et al., -P.2d- (Ariz., NO. CR-88-0372-PR, Consolidated with CV-88-0491-SA, Consolidated with CV-88-0510-SA, April 6, 1989. Today, a majority of this Court holds that "a critical stage in the criminal process does not occur until formal charges are brought against a suspect." (Page 13 of Slip opinion.) This, of course, is probably one of the most revolutionary statements ever uttered by any member of this Court, much less a collective majority of this Court.

whether to take the breathalyzer, counsel would then not be protecting any known right or safeguard by advising a suspect to refuse the test. Counsel's advice as to whether to consent to the breathalyzer under the circumstances of his client's case is a matter of strategic maneuvering, and the taking of calculated risks in the hope of lessening the chances of conviction or the dismissing of criminal charges, and does not come within the penumbra of Art. I, Sec. 10, to mandate the invocation of the right to counsel. (footnote deleted.) *Since an accused has no legal right to withdraw his implicit consent to take the breath test (as distinguished from physically refusing to take the test) 'counsel's absence [of lack of consultation] . . . [does not] derogate from the accused's right to a fair trial.' United States v. Wade,* [388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)], at 226." (My emphasis.) Of course, such rationale comports with what Professor Inbau advocates, See *ante.*

Therefore, given what this Court stated and held in *Forte,* supra, what the Fort Worth Court of Appeals stated and held in its second opinion in *Forte,* supra, and what the First Court of Appeals stated and held in its opinion on remand in this cause, what's new in this cause that requires a different song to be written, much less sung, by a majority of this Court?

It appears to me, at least implicitly, that in this cause all that this Court is doing is attempting to mimic what the Supreme Court has already stated and held on the subject, see *South Dakota v. Neville,* 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983), and *Pennsylvania v. Bruder,* supra, in its interpretation of the federal constitution, and apply same as a matter of Texas Constitutional law to this cause.

I observe that the majority opinion also attempts to apply the due process of law rationale that was created in *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), and its progeny, to the pretrial and pre-formal charge stage of a driving while intoxicated offense case. However, either expressly or implicitly, the Supreme Court of the United States has already killed and buried that old dog. Thus, until it experiences reincarnation, that old dog can't hunt anymore.

History teaches us that until the "Warren Court" became entrenched, except in those cases where the facts of the case shocked the consciences of at least a majority of the members of the Supreme Court, that Court would not become involved in state criminal cases.

It was actually not until 1963, when *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), was decided, that federal district court judges and the federal circuit courts of appeals began to concern themselves with the preservation of individual criminal legal rights under the Federal Constitution.

However, ever since the "Burger Court" and the present "Rehnquist Court" became entrenched, there is no longer any desire by a majority of the Supreme Court to concern themselves with the preservation of or extending any individual criminal legal rights that might exist under the Federal Constitution. See Miller, "The Great Writ, Habeas Corpus", Vol. 22, No. 2, *The Prosecutor*. In fact, notwithstanding the fact that "The number of [habeas] petitions is at about the time level as 20 years ago", so says Professor Ira Robbins, an expert in post-conviction remedies at American University Washington

College of Law, Chief Justice Rehnquist recently appointed retired Justice Powell to head up the "Special Committee on Habeas Corpus Review of Capital Sentences", a committee whose members some say are extremely conservative and hostile to habeas review of death penalty convictions and sentences in federal courts of state convictions. See "Use of Habeas Writ Study Imperiled by Study", *The National Law Journal*, Vol. 11, No. 12, November 28, 1988.

The distinction between the due process of law right to have the assistance of counsel *at trial*, or *in the courtroom*, and the due process of law right to have the assistance of counsel during the *pre-trial* stage of the trial is often overlooked, which failure I find causes the majority opinion to be extremely flawed in its discussion on the subject of a defendant's due process of law right to have the assistance of counsel prior to the initiation of formal adversary proceedings. At least since the early 1930's, in capital murder cases, a majority of the Supreme Court was careful to see that an indigent accused's "courtroom" right to have the assistance of counsel under the Fourteenth Amendment's Due Process of Law Clause was fully protected. However, until the 1960's, when it came to matters that pertained to the pretrial stage of the criminal process, or in the gathering of evidence stage of the process, unless the fact "shocked the conscience" of the Court, or offended "those canons of decency and fairness which express the notions of justice of English-speaking peoples", see, for example, *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), the Supreme Court would not get involved with a state criminal conviction. Thus, unless the facts of a state criminal

case were obtained in violation of the above, any incriminating evidence that was obtained prior to the courtroom stage of the process became admissible at the defendant's trial. See, for example, *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949). It was not until the Supreme Court decided *Powell v. Alabama*, supra, that the indigent accused *in a capital murder trial* was given the right to have the assistance of counsel after formal criminal charges were filed. In its non-unanimous opinion of *Powell*, supra, the Court held: "[W]here the defendant was unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." The Court stressed in its majority opinion of *Powell*, supra, that that was "[a]ll that is necessary now to decide." Thus, anything stated in *Powell*, supra, that might relate to the pre-formal charge stage of the criminal process is pure dicta. However, there can be no question that the facts set out in *Powell v. Alabama*, supra, "shocked the consciences" of all but one member of the Supreme Court. Mister Justice Butler dissented to the Supreme Court "trespassing" on "a field hitherto occupied exclusively by the several states." Also see *Hernandez v. State*, 726 S.W.2d 53, 64 (Tex.Cr.App. 1986) (Teague, J., concurring and dissenting opinion).

When it came to whether an indigent accused was entitled to have the assistance of counsel in a non-capital case, the Supreme Court, however, ruled that under the due process clause "each case depends on its own facts." *Uveges v. Pennsylvania*, 335 U.S. 437, 69 S.Ct. 184, 93

L.Ed.2d 127 (1948). In *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the Court ruled that the Sixth Amendment right to counsel *at trial*, or *in the courtroom*, was made applicable to the States through the Due Process Clause of the Fourteenth Amendment of the Federal Constitution. Interestingly, "Since at least 1948, in capital cases, and since at least 1957, in non-capital cases, Texas has required that, when requested, indigents must be furnished counsel [for their trials]. See 28 *Tex.L.Rev.* 236 (1949); Morrison, 'Requiring the Appointment of Counsel at Trial and on Appeal,' 28 *Tex. Bar J.* 23 (1965); Onion, "The Right to Counsel,' 28 *Tex. Bar J. 357 (1965).*" *Hernandez*, supra, at 72.

The right to have the assistance of counsel was extended to persons accused of misdemeanor crimes, provided that the punishment that could be assessed included jail time. See *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). Also see *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979).

My research reveals that the issue of whether an accused person has the right to have the assistance of counsel under the Due Process Clause of the Fourteenth Amendment during pretrial was first decided by the Supreme Court *in 1958* in its unfavorable to the defendant decision of *Crooker v. California*, 357 U.S. 433, 78 S.Ct. 1287, -L.Ed.2d- (1958). At that time, the Supreme Court was still using its "shocks the conscience" test.

In *Crooker*, supra, the Supreme Court was confronted with the situation where the defendant, prior to giving the police a confession, had requested the assistance of a specific attorney who he thought might represent him.

The police told him that he could contact this attorney after the investigation was concluded, which meant after they had obtained a confession from him. Subsequently, the defendant gave a detailed confession to the murder which the police suspected him of committing. When the District Attorney sought to have the defendant orally repeat his written confession, the defendant again requested that the attorney who he thought might represent him be called on the telephone, which was done by the District Attorney, after which the defendant and his attorney communicated by telephone, which conversation, unknown to them, was tape recorded by the District Attorney. The attorney apparently told the defendant not to speak further to the District Attorney, and the defendant followed his advice, after which the defendant was returned to his jail cell. He later met with the attorney, and the attorney thereafter represented him at his trial. In rejecting the defendant's contention that the prosecutor's use of his confession at his trial violated due process of law, because it was obtained after denial of the defendant's request to contact his attorney before he gave the confession, the Supreme Court first found that the confession was anything other than voluntary, and then ruled that "state refusal of a request to engage counsel violates due process only if the accused is deprived of counsel at trial on the merits, Chandler v. Fretag, [348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4 (1954)], and if he is deprived of counsel for any part of the pretrial proceedings, he must be so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.' Lisenba v. People of State of California, 1941, 314 U.S. 219, 236, 62 L.Ed. 280, 290, 86 L.Ed.

166. cf. Moore v. State of Michigan, 1957, 355 U.S. 155, 160, 78 S.Ct. 191, 194, 2 L.Ed.2d 167. The latter determination necessarily depends upon all the circumstances of the case." 78 S.Ct. at 1292. In footnote 6 of its opinion, the Court pointed out that "What due process requires in one situation may not be required in another, and this, of course, because the least change of circumstances may provide or eliminate fundamental fairness. The ruling here that due process does not always require immediate honoring of a request to obtain one's own counsel in the hours after arrest, hardly means that the same concept of fundamental fairness does not require state appointment of counsel before an accused is put to trial, convicted and sentenced to death." 78 S.Ct. at 1292-93.

The Supreme Court also concluded in *Crooker*, supra, that "the sum total of the circumstances here during the time petitioner was without counsel is a voluntary confession by a college-educated man with law school training who knew of his right to remain silent. Such facts . . . do not approach the prejudicial impact in House v. Mayo, [324 U.S. 42, 65 S.Ct. 517, 89 L.Ed. 739 (1945)], and do not show petitioner to have been so 'taken advantage of,' Townsend v. Burke, 1948, 334 U.S. 736, 739, 68 S.Ct. 1242, 1254, 92 L.Ed. 1690, as to violate due process of law." 78 S.Ct. at 1292. The Court refused to enact a per se rule concerning a violation of the right to counsel, as urged by the defendant, and ruled that "Due process, a concept 'less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights,' Betts v. Brady, 1942, 316 U.S. 455, 462, 62 S.Ct. 1252, 1256, 86 L.Ed. 1595, demands no such rule. (Footnote deleted)." Also see *Cicenia v. La Gay*, 357 U.S. 504, 78

S.Ct. 1297, 2 L.Ed.2d 1523 (1958). Therefore, although the facts of *Crooker*, supra, might have shocked some consciences, they were insufficent to shock the consciences of a majority of the Court.

Soon thereafter, the "Warren Court" took over, but only for a brief period of time. The "Warren Court" was succeeded by the "Burger Court" which was succeeded by the present "Rehnquist Court". In the criminal law field, the latter courts have gone from being arch-conservative to extremely arch-conservative. I believe that the succeeding "Burger Court" or "Rehnquist Court" majority opinions make it clear that anything stated in any of the "Warren Court" majority opinions, that gave the accused individual any legal rights, must be read strictly in the context of the facts of that particular case. In other words, rather then continuing to build on the law as the "Warren Court" did, the "Burger Court" and the "Rehnquist Court" have opted to undo or redo anything that the "Warren Court" majority opinions might have stated, if same was favorable to a criminal defendant. There are, of course, aberrational opinions that have been handed down by those courts, which appear favorable to the defendant, but I believe that it will only be a matter of time before those opinions are either expressly or implicitly overruled, once the majority realizes what they did.

To demonstrate my point that the "Warren Court" was constantly engaging in the "building of the law" principle, i.e., after it decided an issue in one case, it would later take the opportunity to extend its holding in that case in another case, I will discuss some of that Court's more famous "right to counsel" cases.

In *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961), the Supreme Court ruled that the failure of Alabama to provide the defendant in that cause with counsel before arraignment on a capital charge, which under Alabama law was a "critical stage" in criminal proceeding, vitiated the defendant's conviction for capital murder even though the defendant did not demonstrate any disadvantage flowing from the lack of court appointed counsel at arraignment. The Court in *Hamilton*, supra, quoted the following from *Powell v. Alabama*, supra: "[An accused] in a capital case 'requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.' " Of course, these are beautiful sounding words. But observe that *Powell*, supra, dealt with the right of an indigent defendant to have the assistance of counsel at his trial if he was charged with committing capital murder, whereas *Hamilton*, supra, dealt strictly with the arraignment stage of the criminal process.

In *Coleman v. Alabama*, 399 U.S. 1, 84 S.Ct. 1152, 12 L.Ed.2d 190 (1964), the Court held that the defendant in that cause was entitled to have the assistance of counsel at a preliminary hearing, because such was found to be a "critical stage" of the process, and the above quote from *Powell*, supra, was repeated.

Coleman, supra, actually might be the high water mark for the Supreme Court when it came to granting a defendant the right to have the assistance of counsel outside of the usual courtroom context. By 1964, the "Warran Court train" was fast running out of steam, and

by the dissenting opinion that he filed in *Coleman*, supra, Chief Justice Burger made is clear to all that he was then aching, not just to be the chief engineer of the train to which he had been appointed to run, but also aching to assign those members who were then in charge of the train to the "dissenting" compartment of the train.

Therefore, when one reads in the majority opinion the quotes from such cases as *Powell*, supra, *In re Gault*, 378 U.S.1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), and *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), he should keep in mind that those cases must be strictly read and limited to their own peculiar factual surrounding. Of course, the same is true when one reads any of this Court's majority or unanimous opinions.

Whether an individual who has been lawfully arrested for driving while intoxicated, and formal charges have not been filed, has a Texas Constitutional right to have the assistance of counsel in the field or at the station house is now totally dependent upon how this Court interprets the provisions of Act. I, § 10, of the Texas Constitution, and in particular how it interprets the terms or phrase "criminal prosecutions." I do not find in either this Court's recent *Forte*, supra, opinion or in today's majority opinion any discussion about that phrase.

There appears to be two viewpoints on how the term or phrase "criminal prosecution" should be interpreted.

Justice Douglas, in the concurring opinion that he filed in *Coleman v. Alabama*, supra, correctly pointed out the following: "A 'criminal prosecution' certainly does not start only when the trial starts. If the commencement of the trial were the start of the 'criminal prosecution' in

the constitutional sense, then indigents would likely go to trial without effective representation by counsel." 26 L.Ed.2d at 400.

The other viewpoint is that such term or phrase is limited to the courtroom, which appears to be the viewpoint that the "Rehnquist Court" and a majority of the members of this Court subscribe to, if all that the police want is for the defendant to perform on video and submit a blood or breath bodily substance. Of course, by interpreting the term or phrase in that manner, where formal criminal charges have not been filed, this eliminates the need to discuss whether such a defendant has the right to have the assistance of counsel at that stage of the process.

My vote is to adopt Justice Douglas' viewpoint, that the term or phrase "criminal prosecution" is not limited just to the courtroom, and at least is applicable to the station house stage of the criminal process. Shouldn't the majority opinion expressly tell us why the term or phrase "criminal prosecution" is only applicable to the post-formal charge stage of the criminal process, and why in a driving while intoxicated situation it should not be applicable to the field or the station house stage of the criminal process, when it comes to an accused's right to have the assistance of counsel?

A majority of this Court has already held that *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), is not applicable to a driving while intoxicated case because it is a Fifth Amendment-interrogation or constitutional privilege against compulsory self-incrimination case. Thus, it is limited to the custodial interrogation situation, which does not, in the eyes and minds of

the majority of the "Rehnquist Court" or a majority of this Court, cover the "breathalyzer stage" of the proceedings, because they believe that requesting the defendant to submit to a blood or breath test does not constitute "custodial interrogation", nor do they believe that it constitutes the giving of testimony by the defendant, notwithstanding the fact that, if the defendant refuses to take the offered test, his "testimonial" refusal is admissible evidence against him at his trial. See *Mc Cambidge v. State*, 712 S.W.2d 499, 506 (Tex.Cr.App. 1986) (Held, "Not only does the breath testing decision not involve custodial interrogation, it also does not involve the privilege against self-incrimination. A rule that focuses on preventing collection of a breath sample, merely because a defendant has been informed of his right to have counsel present if he is interrogated, would severely restrict police officers in the pursuit of lawfully collecting evidence of intoxication and, more significantly, do nothing to further protect the privilege against self-incrimination. Therefore, we find that appellant, under the instant facts, has no remedy under *Miranda v. Arizona*, supra, or *Edwards v, Arizona*, supra.[18] (footnote in original.)

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[18] In finding that appellant has no remedy under *Miranda v. Arizona*, supra, or *Edwards v. Arizona*, supra, we do not imply that a remedy will never be available to a suspect *who is confused* when faced with *Miranda* warnings and a breath testing decision without the benefit of requested counsel. [emphasis supplied.] We are simply limiting our decision in the instant case to the issues and remedy requested by appellant in his petition for review. The legislature is free to enlarge upon the statutory warnings required at present, thus requiring a police officer to inform a suspect that *Miranda* warnings do not

(Continued on following page)

In this Court's last *Forte*, supra, opinion, the following was stated:

> Thus, in Texas by operating a motor vehicle upon the public highway consent is legally implied. It would defy both logic and common sense to assume that the Legislature of this State would imply consent, then authorize a driver to revoke that implied consent, and ultimately suspend the driver's license for exercising the right of refusal. In actuality, *Since the suspect has no legal choice whether to take the breathalyzer*, counsel would then not be protecting any known right or safeguard by advising a suspect to refuse the test. Counsel's advice as to whether to consent to the breathalyzer under the circumstances of his client's case is a matter of strategic maneuvering, and the taking of calculated risks in the hope of lessening the chances of conviction or the dismissing of criminal charges, and does not come within the penumbra of Art. I, Sec. 10, to mandate the invocation of the right to counsel. (footnote deleted.) *Since an accused has no legal right to withdraw his implicit consent to take the breath test (as distinguished from physically refusing to take the test) 'counsel's absence [or lack of consultation] . . . [does not] derogate from the accused's right to a fair trial.'* United States v. Wade, supra, at ___. Therefore, the time at which an accused is faced with the decision of whether to submit to a breath test is not a 'critical stage'

(Continued from previous page)

apply to the breath testing decision. See art. 6701L-5, § 2 (b), supra. However, we believe it would be inappropriate for this Court to make such an expansion of statutory warnings absent legislative authority." Unfortunately, the majority opinion did not clarify exactly what constitutes or can constitute "confusion" by the accused who is in the "breathalyzer stage" of a driving while intoxicated case process.

> of the criminal process which necessitates either the the prior consultation with or presence of counsel under the right to counsel provision of Art. I, § 10 of the Texas Constitution. Accordingly, we hold, as we did when we considered the matter under the Sixth Amendment, the '[a]ppellant's right to counsel did not attach until the time the complaint was filed.' *Forte v. State*, 707 S.W.2d 89 (Tex.Cr.App.1986). (Emphasis supplied.)

I have concluded that, given the above, perhaps this Court has succeeded where Jack Cade failed, see Shakespeare, *Henry the Sixth*, Pt. 2, Act 4, scene 2, when Dick the Butcher stated to Jack Cade, "The first thing we do, let's kill all the lawyer's", and Jack responded: "Nay, that I mean to do."

I respectfully dissent to the majority opinion's holding that under the facts of this cause "appellant's right to counsel did not attach until the time the complaint was filed." I would adopt and apply, as a matter of state constitutional law, what Justice Douglas stated in the dissenting opinion that he filed in *Crooker*, supra.

TEAGUE, Judge

EN BANC

DELIVERED: SEPTEMBER 11, 1989

PUBLISH

No. 89-794

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1989

DENNIS MICHAEL McCAMBRIDGE,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution allows a suspect in custody for suspicion of driving while intoxicated, but prior to the initiation of criminal proceedings, to be provided the limited right to the assistance of counsel prior to submitting to a chemical test or motor skills exercises?

II. Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution permits a trial judge to reject defendant's claim that his eventual consent to provide a breath sample in a driving while intoxicated prosecution was involuntary where the State produces no evidence to rebut the defendant's evidence of coercion?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutions, Statutes and Rules

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The latest opinion of the Texas Court of Criminal Appeals is reported below as *McCambridge v. State*, 778 S.W.2d 70 (1989). A copy of the opinion is attached

[1]For clarity, Respondent is referred to as "the state," and Petitioner as "McCambridge."

to the petition for writ of certiorari as Appendix D. The opinion of the First Court of Appeals of Texas is reported in *McCambridge v. State*, 725 S.W.2d 418 (Tex.App.--Houston [1st Dist.] 1987), and is attached to the petition for writ of certiorari as Appendix C. The first opinion of the Texas Court of Criminal Appeals in this case is *McCambridge v. State*, 712 S.W.2d 499 (1986), and it is also attached to the petition for writ of certiorari as Appendix B. The original appellate review of this case by the First Court of Appeals of Texas is reported in *McCambridge v. State*, 698 S.W.2d 390 (Tex.App.--Houston [1st Dist.] 1985), and is attached to the petition for writ of certiorari as Appendix A.

JURISDICTION

McCambridge relies on 28 U.S.C. § 1257 to invoke the Court's jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

McCambridge bases his claim for relief on the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The state has lawful and valid custody of McCambridge pursuant to a judgment and sentence of the County Criminal Court at Law No. 3 of Harris County, Texas. McCambridge was charged with the misdemeanor offense of driving while intoxicated. He filed a pretrial motion to suppress a video tape recording made after his arrest and the results of a breath-alcohol test taken at the time of his arrest. The court suppressed the audio portion of the video tape but denied the rest of his motion. McCambridge thereafter pled guilty to the court and, pursuant to a

plea bargain agreement, was sentenced to six months in jail, probated for two years, and a $200.00 fine.

McCambridge appealed to the Court of Appeals for the First Supreme Judicial District of Texas, which affirmed. *McCambridge v. State*, 698 S.W.2d 390 (Tex. App. -- Houston [1st Dist.] 1985). The Court of Criminal Appeals, on petition for discretionary review, remanded the case for determination whether a person has a right to counsel under the Fourteenth Amendment prior to taking a breath test. *McCambridge v. State*, 712 S.W.2d 499 (Tex. Crim. App. 1986). The Court of Appeals again affirmed, holding that there was no right under the Due Process Clause to the assistance of counsel prior to taking a breath test. *McCambridge v. State*, 725 S.W.2d 418 (Tex. App. -- Houston [1st Dist.] 1987). Once again, the Court of Criminal Appeals granted discretionary review, and affirmed. *McCambridge v. State*, 778 SW.2d 70 (Tex. Crim. App. 1989).

STATEMENT OF FACTS

McCambridge was arrested on May 21, 1984, at approximately 11:00 p.m., for suspicion of driving while intoxicated by two Houston police officers. He asked for a lawyer as he was being placed in the police car and was told that he could not have one until he got downtown. McCambridge was then taken to the police station, where he was placed in a video interrogation room. The police officers read him his *Miranda*[2] rights and he requested a lawyer. McCambridge then was allowed to use the telephone. He called his wife so that she could contact an attorney. After requesting a callback number, McCambridge was told that no incoming calls would be permitted.

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[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

When McCambridge completed the call to his wife, the police officers began to converse with him. He again requested counsel and was given another opportunity to use the telephone to call a lawyer. McCambridge tried to call his wife back but the line was busy and he hung up. The police then resumed their conversation with him. The transcript of the hearing on McCambridge's motion to suppress does not reveal the content of the these conversations and the videotape is not included in the record. It is unclear whether the police officers were engaging in substantive interrogation or were merely trying to persuade McCambridge to take the breath test.

While in the videotaping room, McCambridge requested counsel seven more times. Upon his eleventh request for counsel, the videotaping was terminated and McCambridge was taken out of the room and into a hallway where he was repeatedly asked to take the breath test. McCambridge agreed after five to ten minutes to provide a breath sample, though he continued to request the presence of an attorney.

McCambridge was taken to the intoxilyzer and was given the statutory breath test warnings required by Tex. Rev. Civ. Stat. Ann. art.6701l-5, §2(b),(Vernon Supp. 1990). McCambridge again agreed to provide a breath sample. Shortly after he took the breath test, at 2:24 a.m. on May 22, 1984, a complaint and information were filed charging him with driving while intoxicated. McCambridge received a pre-trial hearing at which he pressed a motion to suppress the videotape and the results of the breath test. Both McCambridge and the intoxilyzer operator testified at this hearing. The trial court suppressed the audio portion of the tape, but denied suppression of the intoxilyzer results and the video portion of the tape. McCambridge then

pled guilty pursuant to a plea bargain which allowed him to appeal the result of the suppression hearing. He was sentenced to six months confinement in jail, probated for two years, and a $200.00 fine.

SUMMARY OF THE ARGUMENT

There are no special or important reasons advanced that would warrant the Court exercising its certiorari jurisdiction.

McCambridge's claim that a person accused of driving while intoxicated has a right to counsel under the Fourteenth Amendment before deciding whether to submit to a breath test is not properly before the Court because, as a matter of federal constitutional law, he waived all non-jurisdictional defects by entering a knowing and voluntary guilty plea to the charges against him.

There is no factual basis to support McCambridge's legal argument. McCambridge argues for a rule that would create a limited right to consult with an attorney during the brief time after arrest and before the alcohol content of a suspect's blood is dissipated by the liver. It is undisputed that McCambridge was given an opportunity to call an attorney on two separate occasions prior to taking the breath test. Thus, he has already received the benefit he is seeking from the Court.

Schmerber v. California, 384 U.S. 757 (1966), holds that there is no constitutional right to refuse to undergo chemical testing to determine blood alcohol content in a DWI investigation. Although the Texas implied consent statute provides that a suspect may refuse to provide a breath or blood sample, such a suspect does not have a "right" to so refuse but merely

has the physical power to refuse. The refusal to provide a sample is itself an illegal act as evidenced by the automatic revocation of the driving privilege in the event of such a refusal. The assistance of counsel is certainly required to protect substantive rights or to guarantee fundamental fairness in the criminal system, but the assistance of counsel in deciding whether to pursue an illegal course of conduct is clearly improper.

The Sixth Amendment exclusively covers the right to counsel in criminal prosecutions. Under a Sixth Amendment analysis, the right to counsel attaches when formal charges are filed against the accused. *Kirby v. Illinois*, 406 U.S. 682 (1972), *United States v. Gouveia*, 467 U.S. 180 (1984). The right to counsel under the Fourteenth Amendment has evolved in the context of civil, quasi-civil, and appellate proceedings. It would be senseless to engraft upon the Fourteenth Amendment a right already provided by the Sixth Amendment.

A bright line rule which does not require that police allow a DWI suspect to have the assistance of a lawyer prior to deciding whether to take a chemical sobriety test and before the formal filing of charges will ultimately benefit the public. Such a rule will provide consistency of procedure throughout the various police departments. It will ensure predictability in the admission of evidence at trial and will also provide certainty as to the disposition of this issue upon appellate review.

McCambridge's contention that the state presented no evidence to rebut his assertion that he was coerced into submitting to the breath test is contrary to the record. The intoxilyzer operator was called by the state and testified that McCambridge

consented to the breath test because he was worried that he would lose his driver's license. This testimony created a sufficient fact question for the trial judge, as finder of fact in a suppression hearing, to use his experience and discretion to rule against McCambridge.

McCambridge's own testimony did not provide sufficient basis for the trial court to find coercion. McCambridge was not physically threatened, he was not deprived of food, water, or other physical necessities for any significant time, and he was not beaten or verbally abused. He merely sensed that the police officers were hostile and he claims that he was told that he would be found guilty automatically, and he would lose his job if he was found guilty. Such statements, even if made by police officers, would hardly seem credible to a person with even the slightest familiarity with the presumption of innocence and its application in the criminal justice system. Further, such statements were clearly shown to be false when McCambridge was read the statutory warnings required before administering the breath test. For the aforementioned reasons, it is clear that the trial judge denied McCambridge's motion to suppress on the coercion claim because of the facts presented at the hearing, and no question of law is presented.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. McCambridge has advanced no special or important reason in this case, and none exists. There is no factual basis for his assertion of a due process right to counsel inasmuch as he received the right to which he claims he was entitled. The trial court's denial of McCambridge's motion to suppress the results of the intoxilyzer test was based on the court's resolution of conflicting factual assertions, and this Court does not sit to review factual determinations made by lower courts.

II.

McCAMBRIDGE'S GUILTY PLEA WAIVED HIS CLAIM THAT HE WAS ENTITLED TO CONSULT WITH AN ATTORNEY BEFORE DECIDING WHETHER TO TAKE AN INTOXILYZER TEST.

McCambridge's assertion he had a right under the Fourteenth Amendment to the assistance of counsel before deciding whether to take the intoxilyzer test is not properly before the Court. As a matter of federal constitutional law, when he pled guilty, McCambridge

waived all non-jurisdictional defects in the proceedings against him. Thus, any challenge to the validity of his conviction is limited to claims that his plea was unknowing and involuntary. *Tollett v. Henderson*, 411 U.S. 258 (1973). McCambridge, however, makes no allegation that he entered his guilty plea without full knowledge of its consequences. Accordingly, his claim presents nothing for review by this Court.

III.

THE UNCONTROVERTED FACTS PROVIDE NO BASIS FOR THE LEGAL ISSUE ARGUED IN THIS CASE BECAUSE McCAMBRIDGE WAS TWICE AFFORDED A REASONABLE OPPORTUNITY TO SPEAK WITH A LAWYER.

McCambridge cites to the opinions in *Kuntz v. State Highway Commissioner*, 405 N.W.2d 285 (N.D. 1987), *State v. Juarez*, 775 P.2d 1140 (Ariz. 1989), *Sites v. State*, 481 A.2d 192 (Md. 1984), and *State v. Newton*, 636 P.2d 393 (Or. 1981), as instances where courts in other jurisdictions have found that a person arrested for driving while intoxicated has a right to counsel under the Due Process Clause of the Fourteenth Amendment prior to deciding whether to take a chemical test. He argues that the contrary conclusion of the Texas courts in his case is reason to justify the granting of certiorari. *See* Petition at 11. A careful reading of those cases reveals that *McCambridge* is consistent with their holdings because McCambridge was afforded the reasonable opportunity to contact counsel on two occasions. The cases he cites hold only that an accused in a DWI investigation has a limited

right to counsel that would not unreasonably delay the administration of the breath test.

Kuntz v. State Highway Commissioner was a license revocation case, a civil proceeding. Accordingly, its holding that the Due Process Clause affords a person arrested for DWI the right to consult with an attorney before deciding whether to take a breath test is inapplicable to McCambridge's criminal case.[3] Of interest, however, is the court's holding that, even in a civil context,

> [i]f the person arrested is unable to reach an attorney by telephone or otherwise, within a reasonable time, he can be required to elect between taking the test and refusing it without the aid of an attorney.

Kuntz, 405 N.W.2d at 290.

The record here shows that McCambridge was arrested at approximately 11:00 p.m. and taken to police headquarters. He was formally charged with driving while intoxicated at 2:24 a.m., shortly after taking an intoxilyzer test. Thus, it was approximately three hours after his arrest before McCambridge gave the breath sample. During that time, he was given two opportunities to contact an attorney, although his efforts were unsuccessful. The accuracy of the test diminishes with the passage of time and dissipation of alcohol from the body's system, and McCambridge

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[3]As noted *infra*, the due process right to counsel generally has been restricted to civil, quasi-civil, and appellate cases since the Sixth Amendment's requirement of counsel in criminal cases was extended to the states by the Fourteenth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

cannot show that it was unreasonable of the police to require him after that long a time to "elect between taking the test and refusing it without the aid of an attorney."

State v. Juarez was a criminal prosecution in which the Arizona Supreme Court held that it was a violation of the *Sixth Amendment's* right to counsel to deny the accused in a DWI case the opportunity to call an attorney during the mandatory 20-minute observation period prior to videotaping because such a phone call would not disrupt the investigation or unreasonably delay the breath test. 775 P.2d at 1145. The court did not discuss the applicability of the Fourteenth Amendment in such a case. Consequently, *Juarez* is not relevant to this case.

Sites v. State, 481 A.2d 192 (Md. 1984), is at the very heart of McCambridge's argument. In *Sites*, the Maryland Supreme Court held that the Fourteenth Amendment guarantees a DWI suspect the reasonable opportunity to contact a lawyer before deciding whether to take a test to determine whether he was intoxicated. *Id.* at 200. However, the defendant in *Sites*, unlike McCambridge, was denied any access to a telephone despite his repeated requests. The court stressed that the right to counsel was limited in that it could not unreasonably delay administration of the test.

> We emphasize that in no event can the right to communicate with counsel be permitted to delay the test for an unreasonable time since, to be sure, that would impair the accuracy of the test and defeat the purpose of the statute.

Id.

In *Newton*, the Oregon Supreme Court noted that the Sixth Amendment right to counsel does not attach at the time an accused had to decide whether to submit to a chemical test, but concluded that due process prohibits the state from "unlawfully restricting [a defendant's] liberty [to call counsel]." 636 P.2d at 407. As in *Sites* and *Kuntz*, however, the right is limited to those circumstances where there is no danger that "highly evanescent" evidence would be destroyed by the resultant delay. *Id.* at 406. Significantly, the *Newton* court found that it was unnecessary to suppress the results of the breath test there because there was no indication that the accused would have gotten in touch with an attorney and no assurance that, had he done so, the attorney would have advised him to refuse to take the test. 636 P.2d at 407. McCambridge similarly would not be entitled to relief even under *Newton*, because he had the opportunity to contact an attorney. Further, his contention that counsel would have advised him to submit a blood test rather than a breath test, and to perform the videotape skills exercises (Petition at 15-16) is sheer speculation, unsupported by anything in the record.

McCambridge concedes that on two separate occasions, after requesting a lawyer, he was allowed to use the telephone for that purpose. (Petition at 5-6). Instead, he called his wife with instructions to find him a lawyer. When McCambridge continued to request counsel, the police could have (1) referred him to a specific criminal lawyer, (2) waited an indefinite amount of time until his wife had a lawyer call the police station, or (3) persisted in their requests for a breath sample. The first option would be highly improper for obvious reasons. The second would have resulted in an unreasonable delay while his blood was cleansed of its inculpatory alcohol content. The third

course, which was the one actually pursued, was the only reasonable alternative.

Even if one applies the law of the various jurisdictions which have created a limited right to counsel before submitting to a breath test to the facts of *McCambridge*, the result would be the same. Therefore, this case does not provide the factual context in which to decide this important question of constitutional law. As such, this case is unworthy of this Court's attention and the petition for writ of certiorari should be denied.

IV.

UNDER *SCHMERBER V. CALIFORNIA*, THERE IS NO CONSTITUTIONAL RIGHT TO REFUSE TO TAKE A BREATH TEST. THEREFORE, NO ISSUES INVOLVING THE PROTECTION OF A SUBSTANTIVE RIGHT OR OF FUNDAMENTAL FAIRNESS UNDER THE DUE PROCESS CLAUSE ARE PRESENTED BY THIS CASE.

In *Schmerber v. California*, 384 U.S. 757 (1966), the Court held that the results of blood alcohol tests made from samples forcibly taken from an accused are admissible at trial. In so holding, the Court rejected claims based on due process of law (Fourteenth Amendment), self-incrimination (Fifth Amendment), and assistance of counsel (Sixth Amendment). The Court reasoned that because an accused is not entitled to follow counsel's advice to refuse to submit to non-testimonial procedures which gather physical evidence such as fingerprinting, photographing, or lineups, he is not entitled to refuse to submit to a chemical sobriety test even if so advised by counsel. *Id.* at 764.

The *Schmerber* opinion also specifically noted that because the blood is continuously cleansed of its alcohol content by the liver, a refusal to submit to a blood or breath test amounts to the wrongful act of "destruction of evidence." *Id.* at 770. That the refusal to provide a sample is itself an illegal act is substantiated by the mandatory suspension of the refuser's driver's license in Texas. Tex. Rev. Civ. Stat. Ann. art. 6701l-5, §2(f). Many other states follow the theory that refusing a sobriety test is wrongful and the driver has no lawful choice in the matter. *People v. Sudduth*, 421 P.2d 401, 403 (Cal. 1966), *cert. denied*, 389 U.S. 850 (1967); *State v. Durrant*, 55 Del. 510, 188 A.2d 526 (1963); *State v. Bock*, 80 Idaho 296, 328 P.2d 1065 (1958); *Alldredge v. State*, 239 Ind. 256, 156 N.E.2d 888 (1959); *State v. Benson*, 230 Iowa 1168, 300 N.W. 275 (1941); *Gardner v. Commonwealth*, 195 Va. 945, 81 S.E.2d 614 (1954); *State v. Dugas*, 252 La. 345, 211 So.2d 285 (1968); *State v. Meints*, 189 Neb. 264, 202 N.W.2d 202 (1972); *State v. Cary*, 49 N.J. 343, 230 A.2d 384 (1967); *City of Westerville v. Cunningham*, 15 Ohio St.2d 121, 239 N.E.2d 40 (1968); *Commonwealth v. Robinson*, 229 Pa.Super. 131, 324 A.2d 441 (1974); *State v. Miller*, 257 S.C. 213, 185 S.E.2d 359 (1971); *City of Waukesha v. Godfrey*, 41 Wis.2d 401, 164 N.W.2d 314 (1969).

However, various states, including Texas, recognize that DWI suspects have the physical power to resist the administration of a sobriety test and provide in their implied-consent statutes that if the suspect refuses to provide a breath or blood sample then "none shall be taken." Tex. Rev. Civ. Stat. Ann. art. 6701l-5, §2(a). Such a provision, however, does not elevate the power to refuse into a right to refuse. It is merely a realization by the state that police officers fighting drunks in the jailhouse over a breath sample is an ugly

spectacle which should be avoided.[4] The court in *Bush v. Bright*, 264 Cal.App.2d 788 (1968), stated the proposition more eloquently: "The obvious reason for acquiescence in the refusal of such a test by a person who as a matter of law is 'deemed to have given his consent' is to avoid the violence which would often attend forcible tests upon recalcitrant inebriates." *Id.*, at 790.

This analysis leads to the inescapable conclusion that there is no substantive right to refuse a sobriety test in a DWI investigation. Further, fundamental fairness could not possibly be compromised by restricting a person's ability to commit an illegal act. Notwithstanding McCambridge's assertions to the contrary (Petition at 15), defense counsel routinely advise their clients not to submit to sobriety tests because such evidence is usually inculpatory. Such admonitions are tantamount to advising a client to commit an illegal act and should not be encouraged under findings of constitutional propriety. In this case, as in *Schmerber*, "no issue of counsel's ability to assist petitioner in respect of any of the rights he did possess is presented." 384 U.S. at 766.

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[4]Texas, however, has provided that forcible taking of a sample is required if, as the result of a collision or other accident, someone has died or is close to death. V.A.C.S., Article 6701l-5, §3(i).

V.

THE SIXTH AMENDMENT RIGHT TO COUNSEL EXCLUSIVELY COVERS CRIMINAL PROSECUTIONS, WHILE THE FOURTEENTH AMENDMENT ADDRESSES THE RIGHT TO COUNSEL IN CIVIL, QUASI-CIVIL, AND APPELLATE PROCEEDINGS.

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right ... to have assistance of counsel for his defense." The plain language of this amendment indicates that it applies to criminal cases. This Court, however, in *Powell v. Alabama*, 287 U.S. 45 (1932), held that the Due Process Clause of the Fourteenth Amendment requires the states to provide counsel to a criminal defendant exposed to the death penalty. The state here does not quarrel with the rule of *Powell*, but submits rather that the philosophical basis for finding a right to counsel -- fundamental fairness -- under the Fourteenth Amendment in criminal prosecutions is no longer advantageous or necessary given the historical development of constitutional doctrine.

In 1932, this Court had not yet begun to selectively apply the Bill of Rights to the states. At that time, the Court needed a mechanism with which to address egregious injustices suffered by citizens at the hands of state courts. The Fourteenth Amendment and its attendant analysis of fundamental fairness served admirably in this regard. In 1963, however, such needs were obviated by *Gideon v. Wainwright*, 372 U.S. 335, which made the Sixth Amendment applicable to the states through the Fourteenth Amendment. Nonetheless, the Sixth Amendment by its own terms

still applied only to criminal prosecutions. The right to counsel under the Fourteenth Amendment survived to provide guarantees of fairness in other contexts.

Goldberg v. Kelly, 397 U.S. 266 (1970), held that welfare recipients are entitled to a hearing, and appointed counsel, before their benefits can be terminated. This holding demonstrated that the right to counsel could obtain in a civil context. *In re Gault*, 387 U.S. 1 (1967) (juvenile delinquency proceedings), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (parole or probation revocation proceedings), established a Fourteenth Amendment right to counsel in quasi-civil matters. *Douglas v. California*, 372 U.S. 353 (1963) and *Evitts v. Lucy*, 469 U.S. 387 (1985), gave indigent defendants the right to effective counsel on appeal.

Having established that the Sixth Amendment right to counsel controls criminal cases at the trial court level, one needs to determine when that right attaches. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), held that the right to counsel attaches when adversary judicial proceedings are initiated against the accused and the government has committed itself to prosecute. This filing of formal charges is the essence of the "critical stage" analysis. The mere gathering of evidence such as fingerprinting or taking blood samples has been held not to constitute a critical stage which requires the assistance of counsel. *United States v. Wade*, 388 U.S. 218, 227-28 (1967).

A DWI prosecution is obviously a criminal case. Here, McCambridge seeks to avoid the Sixth Amendment and its critical stage analysis because formal charges were filed against him only after he voluntarily took the breath test. He seeks to have this Court engraft a right which is already granted by the Sixth Amendment onto the Fourteenth Amendment so

that he can avoid conviction for his crime. From McCambridge's viewpoint, this is self-serving at best. From a legal perspective it is confusing and senseless at the very least.

VI.

A BRIGHT-LINE RULE THAT PROVIDES FOR A RIGHT TO COUNSEL WHEN CRIMINAL PROCEEDINGS ARE INITIATED WILL SERVE IMPORTANT PUBLIC POLICY CONCERNS.

This Court has on numerous occasions stressed the virtue of bright-line rules in the area of law enforcement. *See, e.g., Arizona v. Roberson*, 486 U.S. 675, 681 (1988); *Michigan v. Jackson*, 475 U.S. 625, 634 (1986). Such rules serve to inform the police and prosecutors exactly what is required of them in conducting criminal investigations. They further allow both trial and appellate courts to rationally and consistently determine whether violations of a defendant's rights have occurred and, if so, what corrective measures are necessary. The less ambiguity there is in the rule, the more likely that it will be adhered to. Litigation seeking to refine arcane facets of constitutional protections will thus be reduced, and the truth-finding purpose of the trial will be furthered. A rule that makes it clear that the right to counsel attaches in all cases only when formal adversarial proceedings have begun places no undue burden on the accused and promotes fairness and consistency in conducting all criminal investigations. To adopt the rule McCambridge seeks would introduce confusion and uncertainty into the process, while producing no measurable gain to defendants.

VII.

THE RECORD REFLECTS THAT THE STATE INTRODUCED SUFFICIENT EVIDENCE AT THE SUPPRESSION HEARING TO SUPPORT THE TRIAL COURT'S DETERMINATION THAT McCAMBRIDGE VOLUNTARILY SUBMITTED TO THE INTOXILYZER TEST.

McCambridge contends that the state failed to controvert his testimony at the suppression hearing that he took the intoxilyzer test only because he was coerced by the police. Thus, he contends, the results of the test should have been suppressed. The record reflects, however, and McCambridge concedes, that the state called the intoxilyzer operator to testify at the suppression hearing. He testified that he read McCambridge the warnings required to be given by Tex. Rev. Civ. Stat. Ann. art. 6701l-5, §2(b), *viz.*, that if he refused to give the breath specimen, his refusal could be used as evidence against him in any subsequent prosecution, and that his license to drive would be suspended automatically for ninety days. The officer further testified that McCambridge stated he would take the breath test because he was concerned about losing his driver's license.

At no time, either at the suppression hearing or in his brief, has McCambridge contended that he was physically threatened or abused, that he was deprived of any physical necessities, such as food or water, that he was beaten, or that he was verbally abused. Although he claimed the police were hostile to him, he did not inform anyone that he felt compelled to take the intoxilyzer test because of any police overreaching. Indeed, his only comment that appears in the record was his statement to the intoxilyzer operator, after

being informed of the effects of his refusal, that he was concerned about losing his license and would take the test to avoid having that happen. The testimony of the intoxilyzer operator clearly contradicted McCambridge's claim that he was coerced into taking the test, and was sufficient to support the trial court's finding that his decision to give a breath sample was voluntary and not the result of police coercion.

CONCLUSION

For the foregoing reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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